No. 93-743

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

LARRY WOLLERSHEIM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

ERIC M. LIEBERMAN
Counsel of Record
Rabinowitz, Boudin, Standard,
Krinksy & Lieberman, P.C.
740 Broadway at Astor Place
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870
Attorneys for Petitioner
Church of Scientology of California

November 9, 1993

QUESTIONS PRESENTED

1. Whether, in a state court common law tort action, due process requires that a jury verdict that is the product of passion or prejudice be reversed for a new trial on all issues?

2. Whether an appellate court is required to reverse a jury's general verdict against a church for intentional infliction of emotional distress, where the underlying claims presented to the jury included religious speech and practices found to be protected by the First Amendment, as well as purported acts which may be unprotected, and where the jury's verdict therefore may have rested upon grounds improper under the First Amendment?

3. Whether an appellate court must engage in an independent review of the record where a judgment is based upon activity ordinarily protected under the First Amendment, and where there exist contextual factual issues which would determine whether the activity may be stripped of constitutional protection?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
Larry Wollersheim

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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The Church of Scientology of California petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District.[1/]

Opinions Below

The July 15, 1993 order of the Supreme Court of California dismissing its prior order granting review of the case (1a)[2/] is unreported. The July 23, 1992 order of the Supreme Court of California granting review but deferring briefing of the case (2a) is reported at 10 Cal.Rptr. 2nd 182 (1992). The March 20, 1992 opinion of the California Court of Appeal, Second Appellate District (3a - 34a), as subsequently modified by that Court on April 20, 1992 (35a), is reported at 4 Cal. App. 4th 1290, 6 Cal. Rptr. 2d 532 (1992).

This Court's order of March 18, 1991 granting petitioner's petition for writ of certiorari (No. 89 -1361) from the July 18, 1989 opinion of the California Court of Appeal, and remanding to the Court of Appeal "for further consideration in light of *Pacific Mutual Life Insurance Co.* v. *Haslip*," 499 U.S. 1 (1991), is reported at 499 U.S. 914 (1991).

[1/] The Court of Appeal was the highest California court to review this case on the merits. The Supreme Court of California, acting within its discretionary jurisdiction, initially granted review of this case (2a), but then dismissed its grant of review (1a) without receiving briefs or hearing oral argument. Thus, the California Court of Appeal would appear to be the proper court to which the writ should be granted. *See American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923). If, however, this Court concludes that the Supreme Court of California is the proper court, then we request that this petition be deemed to be directed to that Court. *Cf., Michigan - Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 159-160 (1954).

[2/] References to "___a" are to the appendices to this petition. Citations to "RT ___" are to the Reporters Transcript, numbered A1 to A1009 for pretrial proceedings, and 1 to 15,311 for trial and post-trial proceedings. References to "App. A____" are to pages in the Appellant's Appendix in Lieu of Clerk's Transcript, filed in the Court of Appeal.

The October 26, 1989 order of the Supreme Court of California denying review of the July 18, 1989 opinion by the California Court of Appeal (36a) is unreported. The July 18, 1989 opinion of the California Court of Appeal, Second Appellate District (40a - 79a) is reported at 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989). The August 17, 1989 order of the California Court of Appeal modifying its July 18, 1989 opinion and denying rehearing (37a - 39a) is unreported. The order of the Superior Court of Los Angeles County, State of California, denying, without opinion, motions for a new trial and judgment notwithstanding the verdict (80a-81a) is not reported.

Jurisdiction

The opinion and judgment of the California Court of Appeal, adopting and modifying its earlier July 18, 1989 opinion and judgment, was filed on March 20, 1992 (3a). The Court of Appeal further modified its March 20, 1992 opinion and judgment and denied rehearing on April 20, 1992 (35a). On July 23, 1992, the Supreme Court of California granted review, but deferred briefing (2a). On July 15, 1993, following this Court's decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, ____U.S.____ , 113 S. Ct. 2711 (1993), the Supreme Court of California dismissed its prior grant of review in this case (1a). On September 29, 1993, Justice O'Connor extended the time for filing a petition for writ of certiorari to and including November 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides, in relevant part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Introduction and Statement of the Case

In this action, respondent Wollersheim, a former member of the Church of Scientology of California ("the Church"), sued the Church primarily on the theory that his exposure to the Church's central and peaceful religious practice of auditing[3/] caused him severe emotional distress, and that the practice constituted "outrageous conduct". The jury returned a verdict of $30,000,000, of which $25,000,000 was for punitive damages. The Court of Appeal found that the jury's verdict was the result of passion and prejudice, but refused to vacate it and order a new trial. Instead, the Court of Appeal itself calculated that the plaintiff was entitled to damages of $500,000 in compensatory damages and $2,000,000 in punitive damages, holding that federal cases, including decisions of this Court, mandating a new trial where a verdict is infected with passion and prejudice are not applicable in state court common law tort actions.

The Court of Appeal otherwise affirmed the judgment. While holding that the religious practice of auditing is protected by the First Amendment, the Court of Appeal found that there

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[3/] Auditing is speech in a religious context. It consists of a parishioner and auditor sitting in a room while the auditor asks a series of questions to which the parishioner responds (RT 1991-92, 8335-36). The purpose of auditing in Scientology is to unburden the individual of spiritually painful experiences, both in his present and past lifetimes (a belief of the Scientology religion), and to orient him as a spiritual being (App. A49-A50, A59; RT 8335-36, 8364). *See Hernandez* v. *Commissioner*, 490 U.S. 680, 684-85 (1989).

purportedly was evidence in the record to show that Wollersheim's participation in auditing was coerced by physical force or threats of secular retribution. The Court of Appeal held that such alleged acts of coercion rendered actionable the auditing in which Wollersheim participated. This theory not only was not presented at trial or argued to the jury, but directly contradicted Wollersheim's own theory of the case, which was that his early voluntary experiences with auditing caused him to be "brainwashed" into needing more and more auditing, resulting in continued emotional distress. While the Court of Appeal acknowledged that auditing which was not coerced by force or threats is protected activity under the First Amendment, it refused to apply the rule that a jury's general verdict must be reversed where it may have rested on activity protected by the First Amendment, and it failed to engage in an independent review of the record to insure that the verdict was not based upon protected activity.

1. The Trial

Wollersheim was a member of the religion of Scientology from 1969 until 1979, during which time he intermittently participated in Scientology religious practices, including its central practice of auditing. Wollersheim's complaint alleged two causes of action which went to the jury, for intentional and negligent infliction of emotional distress by outrageous conduct, predominantly by providing auditing to plaintiff (App. A1-20).[4]

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[4] Plaintiff had also alleged two other causes of action, both for fraud: (1) arising from representations which purportedly induced plaintiff to join the Church and engage in auditing; and (2) in failing to disclose the purportedly "experimental" and "dangerous" nature of auditing. Plaintiff presented a massive amount of evidence at trial on these claims that he had been *defrauded* into participating in auditing by false representations about the "supernatural" and other benefits he would receive from it. Plaintiff's fraud claims ultimately were dismissed at the conclusion of his case, leaving him only with his emotional distress claims. The trial court, however, refused to instruct the jury that the evidence on the dismissed fraud counts should be

In pretrial rulings, the trial court held that Scientology was a religion, that auditing was the central religious practice of Scientology, and that at trial Wollersheim could not introduce evidence concerning the Church's belief in and practice of auditing, representations alleged to have been made by members of any Church of Scientology with respect to the benefits, nature or efficacy of auditing, and evidence of the alleged successes or failures of auditing (RT A152, A480). At trial, however, a different judge disregarded these rulings and held that Wollersheim could present evidence of the effect of auditing upon him and the truth or falsity of representations about the benefits he might receive from auditing (RT 84-87), rationalizing that the earlier rulings somehow were meant to apply to beliefs about auditing "in general," and not to Wollersheim's particular experiences with auditing (RT 1344-45, 2217).

At trial, Wollersheim placed his greatest emphasis on his claims that his exposure to auditing caused him severe emotional distress. The theory of Wollersheim's case was that he believed in the value of auditing and *wanted* to undertake it (RT 637-38, 650, 652); that he had, in effect, been defrauded and brainwashed into undergoing auditing as Church teachings made him believe that it was necessary to his physical and spiritual survival (RT 2140-41); and that he participated in auditing because he wanted to, or because, in his own words, he was "addicted" to it (RT 6159-61; *see* RT 4777-79, 4807, 4836-38, 4844-47, 4888-93, 5025-26, 5190-91, 5197-99, 5302, 6178). Wollersheim argued that his exposure to auditing, *per se*, precipitated a latent bipolar disorder, caused him severe emotional harm and constituted outrageous conduct (Complaint, App. A6-8, A10-13, RT 606, 632-33).

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ignored (RT 8151, App. A305). Thus, there is a strong probability that the jury considered the fraud evidence in its deliberations.

Wollersheim continually characterized the introductory levels of auditing as part of a system of "thought reform" (*e.g.*, RT 2414-15, 2343-45, 5012-13, 2606), and described the more advanced levels of auditing as "freaking experiments," and responsible for the destruction of all values in family, God and country (RT 2193-95, 2240-42, 2475-78, 5048-50, 13,897). In closing argument, Wollersheim's counsel placed his greatest emphasis on the auditing allegations:

> [P]laintiff was subjected to Level II programming or auditing by the defendant . . . which conduct was extreme and outrageous . . . [RT 14,456] . . . plaintiff experienced severe personality stress caused by auditing. . . . [RT 14,460] . . . for periods of time he was a psychotic as a result of this auditing surfacing or precipitating the symptoms of the bipolar disorder . . . without his auditing he probably never would have been bothered by [bipolar disorder] in his whole life. [RT 14,493]. . . . In the process of subjecting Larry Wollersheim to the auditing, [the Church] precipitated his bipolar disorder. [It was] precipitated by . . . *particularly* the auditing processing . . . .[RT 14,713].

See also RT 14,467; 14,490-93.

Throughout the trial, Wollersheim and his counsel deliberately insinuated into the record massive amounts of prejudicial testimony, in order to arouse and inflame the jury. Wollersheim managed to bring before the jury numerous prejudicial and irrelevant accusations, including: a theme that the Church was harassing Wollersheim's counsel (RT 5612-13, 2026-29, 13,260-61, 2029, 13,504); false accusations of criminal conduct by the Church (RT 6744-49, 7258, 5113, 1177-78, 1712, 12,408); unsupported accusations that the Church withholds and alters evidence and procures false testimony (RT 13,254-56,

6085-86, 6116, 13,895, 13,896, 1429, 6201, 10,436-57, 11,924, 13,897-98, 6085-86, 6407, 14,055-57, 13,878, 13,879, 13,890, 13,892, 14,055-56, 14,244-45); unsubstantiated charges involving third parties (RT 14,216, 14,222, 14,225-26, 13,301-02, 13,464, 14,067, 14,213-18, 14,220-25); pejorative comparisons between Scientology and a host of unpopular groups, such as totalitarians and communists and the group involved in the Jonestown tragedy (RT 2097, 3191-92, 2340-42, 2282-90, 2297-2315, 2324-34, 7454-56, 7706-11, 7445-49, 7701-02). Not only was the Church's religion denigrated throughout trial (*e.g.*, RT 6161, 6409, 13,895, 6163), but Wollersheim and his counsel repeatedly urged the jury to condemn the Church because of its nontraditional beliefs (*e.g.*, RT 14,763-64).

The trial court instructed the jury that Scientology is a religion and that auditing is its central religious practice (RT 14,778). It refused, however, to give instructions, requested by the Church, that the jury could not award damages based upon "the Plaintiff's participation in auditing . . . or any of the other religious practices of the Church" (App. A312), nor "evaluate the potential . . . harmfulness of religious . . . practices" (App. A309-1), nor consider "the effectiveness . . . of auditing" (App. A305). Wollersheim sought no instruction to the effect that the jury could find the auditing allegations actionable if or to the extent they found that Wollersheim participated in the auditing because of physical force or secular threats; that simply was not Wollersheim's theory of the case.

Wollersheim also alleged that he suffered emotional distress from (1) a Scientology practice which allegedly induced plaintiff to "disconnect" from his first wife and his father, and (2) an alleged attempt by the Church to destroy Wollersheim's picture sales business in May-June 1979 after he left the

Church, by causing his employees and customers who were Scientologists to refuse to work for or pay bills to him.[5/]

[5/] The Church strongly disputed Wollersheim's claim that the Church had ordered him to sever ties with his family. The evidence showed that Church policy was that parishioners should attempt to communicate with friends and family (RT 3449, 1725-26, 1135-36). There was no testimony that any officer or director of the Church, nor any official Church policy, directed Wollersheim to disconnect from his family, but only that three individual Scientologists unconnected with the Church of Scientology of California gave Wollersheim their personal "advice" that he should get away from his first wife after she attacked him with a kitchen knife (RT 4972-73). Wollersheim ignored the advice without threat or reprisal from the Church (RT 4977 *see also* RT 4940, 6638, 3578, 4960-62, 3565, 3577, 4988-89, 4978, 6638, 6639, Ex.289).

Wollersheim claimed that the Church had a purported "fair game" policy which authorized or directed Church members to lie, cheat, harass, or attempt to destroy Church "enemies," which Wollersheim claimed he had become. The Church's evidence showed that the policy, which had been formally repealed before Wollersheim joined the Church (RT 2030, 7961-62, 8556), was never an exhortation to commit tortious acts, but rather concerned the non-availability of the Church's internal justice system to ex-members who had been excommunicated (RT 924-25).

Wollersheim claimed that he was subject to a "fair game" campaign to destroy his picture sales business in May, June, and July of 1979 (RT 7837, 5270-01, 5281, 5351-52). Wollersheim testified that sometime in June, his Scientologist employees resigned *en masse*, and that at about the same time several Scientologist customers stopped placing orders or paying their bills. Wollersheim also testified that he believed the Church had pressured Scientologists to stop paying bills to him, or to his factor (RT 5391-93, 6347-49). No supporting evidence was provided to show that the departure of Wollersheim's employees and customers were authorized or ratified by the Church or were linked in any fashion whatsoever to Church policy or directives.

In any event, the "fair game" and "disconnect" allegations were subordinate to the auditing claims, as Wollersheim acknowledged (RT 14,713), and they all were lumped together in a single claim of intentional infliction of emotional distress. Thus, as demonstrated *infra*, if the auditing claims were barred by the First Amendment, the entire verdict must be reversed because of the high probability that it rested in part or in whole upon protected activity.

The jury returned a verdict for $5,000,000 in compensatory and $25,000,000 in punitive damages. The Church filed motions for new trial and judgment notwithstanding the verdict, arguing, *inter alia*, that the verdict was the result of passion and prejudice and that it was based in major part upon activity protected by the First Amendment. The trial court denied the motions without comment (80a).

2. The California Court of Appeal's Decision of July 18, 1989

The California Court of Appeal found that the jury's verdict was the product of passion and prejudice. The court refused, however, to reverse the verdict and order a new trial. Instead, the court affirmed the judgment as to liability on the claim of intentional infliction of emotional distress, and reduced the damage awards to $500,000 in compensatory damages and $2,000,000 in punitive damages. *Wollersheim* v. *Church of Scientology of California*, 212 Cal. App.3d 872, 260 Cal. Rptr. 331 (1989).

With respect to the auditing claims, the court held that in most contexts auditing constitutes protected activity under the First Amendment, and cannot be made actionable by the state even if it results in severe emotional distress. 212 Cal.App.3d at 892, 260 Cal.Rptr. at 344. The court held, however, that the constitutional protection for auditing was "stripped away" in this case (53a), because evidence purportedly existed in the record from which the jury could have found that Wollersheim did not participate in auditing voluntarily, but rather was coerced into it against his will -- a theory never advanced by Wollersheim or presented to the jury as the predicate by which it could render a verdict on behalf of the plaintiff. The Court of Appeal identified three bases for its finding that Wollersheim was coerced into participating in auditing: (1) that Wollersheim feared that he would be subject to retribution pursuant to "fair game" if he did not participate in auditing; (2) that Wollersheim feared that he would have to pay a financial debt to the Church if he did not participate in auditing; and (3) that Wollersheim was subjected to physical restraint when he attempted to leave

a permanently docked ship at which he purportedly was undergoing discipline for violation of Church staff policy. 212 Cal.App.3d at 893-94, 260 Cal.Rptr. at 344-45 (60a-63a).[6/]

In making its findings, the court looked only to the purported evidence most favorable to Wollersheim rather than undertaking an independent review of the whole evidence as it is required to do in such cases. Even then, the court failed to identify any evidence which supported its new theory that Wollersheim took auditing as a result of coercion, and it ignored Wollersheim's own testimony that he volunteered and even pleaded for auditing, pursuant to his theory that he had been "brainwashed" into needing it.[7/]

[6/] Contrary to the Court of Appeal's finding that Wollersheim was "coerced" into participating in auditing, not only did Wollersheim not argue this theory at trial, but the evidence at trial showed that the three allegedly coercive events relied on by the Court of Appeal did not induce Wollersheim to participate in auditing. The overwhelming evidence, from Wollersheim himself, was that he chose to participate in auditing, although, in his view, because he had been defrauded and "brainwashed" into thinking it was good for him.

[7/] Indeed, in numerous pleadings filed by Wollersheim since the original court of appeal decision of July 18, 1989, Wollersheim has insisted that the "coercion" theory of the Court of Appeal was not a theory he presented to the jury. Instead, Wollersheim contends that auditing is tortious, *per se*, and that he continued to participate in it because he became "addicted" to it. For example, in his petition for review to the Supreme Court of California from the July 18, 1989 decision of the Court of Appeal, Wollersheim asserted that the Court of Appeal's coercion theory was "directly contrary to the evidence":

> [T]he "auditing" as designed and implemented by Scientology was an integral, essential component of Scientology's "thought reform" program and was used primarily to subjugate the will and control the mind.
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> • • •
>
> Under Wollersheim's evidence and theory of the case, there was no such phenomenon as "voluntary auditing".
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> *Indeed, under Wollersheim's theory of the case and evidence, "auditing" was by its very nature and function, coercive.*

Turning to the damages, the Court of Appeal found that the jury award was based on passion and prejudice. It found the jury's imposition of compensatory damages was grossly excessive, and held that the award of $25,000,000 in punitive damages was "preposterous" (78a).[8/] Rather than concluding that a new trial was required due to the jury's passion and prejudice, the court reduced the damage awards by over ninety per cent, to $500,000 compensatory damages and $2,000,000 punitive damages (76a, 78a).[9/]

3. The Remand by this Court

Both parties petitioned for review to the Supreme Court of California, which denied review (36a). Both parties petitioned this Court for a writ of certiorari. In its petitions to the Supreme Court of California and to this Court, the Church raised the due process and First Amendment issues raised anew in this petition. The Court denied Wollersheim's petition (No. 89-1369), 495 U.S. 910 (1990), but granted the Church's petition (No. 89-1361), vacated the Court of Appeal's original judgment and remanded to the Court of Appeal "for further consideration in light of *Pacific Mutual Life Insurance Co.* v. *Haslip*," 499 U.S.

> Therefore, the Decision [of the Court of Appeal] in that respect runs directly contrary to the evidence when construed to support the judgment.

Petition for Review of Wollersheim, filed August 28, 1989, at 8-10 (emphasis added).

[8/] The court did not address the Church's arguments that the standardless determination of punitive damages violates constitutional due process.

[9/] Both parties petitioned for rehearing, raising various issues. The Church argued, *inter alia*, that the court's finding that the damage awards were the product of passion and prejudice and indeed were "preposterous" required a new trial, rather than mere reduction of damages. The petitions for rehearing were denied on August 17, 1989. The only substantive modification made by the court was to eliminate the word "preposterous" from its opinion (38a-39a).

1 (1991). *Church of Scientology of California* v. *Wollersheim*, 499 U.S. 914 (1991).

4. The Court of Appeal's Decision of March 20, 1992

On remand, the Church preserved all the issues it had raised in its earlier appeals and petitions. The Court of Appeal limited its reconsideration of its prior decision solely to the constitutionality of the punitive damage award (5a). While reaffirming that both the compensatory and punitive damage awards were the product of passion and prejudice, the court devoted one scant paragraph to the Church's principal argument that, in light of that finding, a new trial was required on all issues (24a-25a). The court incorrectly characterized the Church's argument as resting on a single case, *Minneapolis, St. Paul & S.S.M. Ry. Co.* v. *Moquin*, 283 U.S. 520 (1931), which it held to be inapplicable to state court common law tort actions because it arose under federal law and therefore was irrelevant to due process analysis. *Id.* The court ignored the Church's reliance on explicit statements supporting its position in *Haslip* itself, 499 U.S at 9, and in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989), as well as numerous lower federal appellate courts.

The court then reversed the award of compensatory and punitive damages, unless Wollersheim agreed to a remittitur reducing the compensatory damages to $500,000 and the punitive damages to $2,000,000 (24a, 27a). On April 20, 1992, the Court of Appeal modified its decision to remove some references to setting aside the damage awards unless Wollersheim *agreed* to a remittitur. The modified opinion concludes that "the judgment as to the cause of action for intentional infliction of emotional distress is affirmed with the exception the compensatory damage award is reduced to $500,000 and the punitive damage award is reduced to $2 million" (35a).

5. Further Proceedings in the Supreme Court of California

On July 23, 1992, the Supreme Court of California granted the Church's petition for review, but deferred briefing and oral argument pending further order of the court (2a). On July 15, 1993, following shortly after this Court's decision in *TXO Production Corp.* v. *Alliance Resource Corp.*, ____U.S.____, 113 S. Ct. 2711 (1993), the Supreme Court of California dismissed its prior grant of review (1a), without considering the merits of the Church's petition for review, which had raised *all* the issues raised here.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeal's Holding That Due Process Does Not Require Reversal and a New Trial Where a Jury Verdict is the Product of Passion and Prejudice is Contrary to the Decisions of This Court and is in Conflict with Decisions of the Federal Circuit and District Courts and of other State Courts

This Court long ago made clear that a jury award which is the product of passion or prejudice must be reversed and remanded for a new trial on all issues:

> [N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

Minneapolis, St. Paul & S.S.M. Ry. Co. v. *Moquin*, 283 U.S. 520, 521-22 (1931).

In *Moquin*, the state Supreme Court found that a jury's damage award was the result of passion and prejudice, *Moquin*, 181 Minn. 56, 64, 231 N.W. 829, 833 (Minn. 1930), but refused to reverse the jury's finding of liability, as "[t]he evidence is sufficient to sustain these findings." The state Supreme Court in *Moquin* thus did not order a new trial, but simply reduced the damages if plaintiff would agree to a remittitur, which plaintiff did. *Id.* at 59-60, 231 N.W. at 831. This Court reversed, holding that once it was determined that juror passion and prejudice affected the jury's verdict, a court will not be permitted to speculate as to which parts of the verdict may have been untainted. *Moquin*, 283 U.S. at 521-22.

In this case, the California Court of Appeal acknowledged that the jury verdict was the product of passion and prejudice, and even described the punitive damage portion of the verdict as "preposterous" (78a). Nevertheless, the Court of Appeal refused to order a new trial, but rather reduced the verdict by over ninety per cent to what it deemed a dispassionate jury reasonably would have awarded. The Court of Appeal's reasoning was brief, but long enough to demonstrate its constitutional invalidity:

> *Moquin* is in no sense binding on this or any other California court. *Moquin* was not announcing a rule of federal due process to guide litigation in state courts. Rather this case [sic: *i.e., Moquin*] arose in a federal action tried in state court. It sets forth a rule of federal law and is limited in its application to federal cases.

(24a), 6 Cal. Rptr. 2d at 546.

The Court of Appeal's restrictive reading of *Moquin* is contrary to the views of this Court and most federal and state courts. While it is true that the *Moquin* Court itself did not explicitly state that the rule it announced was grounded in due process, a fair reading of the Court's language must conclude

that the Court viewed the rule as one of fundamental fairness. Any doubts to the contrary were resolved by language in subsequent decisions. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), in rejecting an attempt to impose an actual malice burden upon plaintiffs seeking punitive damages in common law libel actions, the Court found that media defendants are protected by the "general rule that a verdict based on jury prejudice cannot be sustained even when the punitive damages are warranted," and cited *Moquin*. 388 U.S. at 160. Thus, the Court of Appeal's holding that *Moquin* is irrelevant to state court common law tort actions is demonstrably refuted by *Butts*.

In *Haslip*, this Court recently reiterated its adherence to the principle enunciated in *Moquin*, grounding it explicitly in due process. The Court stated that "due process imposes some limits on jury awards of punitive damages, and *it is not disputed that a jury award may not be upheld if it was the product of bias or passion*, or if it was reached in proceedings lacking the basic elements of fundamental fairness." 499 U.S. at 9 (emphasis added), *quoting Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989). Similarly, Justice Kennedy emphasized in his concurring opinion that "[*a*] *verdict* returned by a biased or prejudiced jury *no doubt* violates due process. . . ." 499 U.S. at 41 (Kennedy, J., concurring) (emphasis added). *See* also *TXO Productions Corp.* v. *Alliance Resources Corp.*, ____U.S.____, 113 S. Ct. 2711, 2725 (1993) (Kennedy, J., concurring in part and in the judgment) ("When a punitive damages award reflects bias, passion, or prejudice on the part of the jury . . . the Constitution has been violated no matter what the absolute or relative size of the award"), and at 2729 (O'Connor, J., dissenting) ("Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand").[10/]

[10/] As set forth in Justice O'Connor's opinion in *TXO*, 113 S. Ct. at 2729-2731, the rule requiring a new trial where a jury's verdict is the product of passion or prejudice has deep historical roots both in the "courts at common

Numerous federal and state courts similarly have recognized that, as summarized by Professors Wright and Miller:

> [R]emittiturs . . . are not proper if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability, as well as on damages. In those instances a complete new trial is required.

11 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2815, at 103 (1993).

Thus, the First Circuit has recognized that a "jury's original overestimation of the damages [may] indicate[ ] a passion or prejudice so virulent as to nullify the verdict entirely." *Wagenmann* v. *Adams*, 829 F.2d 196, 216-17 (1st Cir. 1987). The Fifth Circuit has adopted the rule that "[w]hile mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudice . . . may not be so cured. A new trial must be ordered when the verdict results from passion and prejudice." *Simeon* v. *T. Smith and Son, Inc.*, 852 F.2d 1421, 1426 (5th Cir.

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law in England," *id.* at 2729, and "in this Nation as well." *Id.* at 2730. Thus, Lord Mansfield wrote that "if the damages are clearly too large, the Courts will send the inquiry to another jury." *Hewlett* v. *Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (P.C. 1813). Lord Ellenborough elaborated on the rule: "[I]f it appeared to us . . . that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury." *Chambers* v. *Caulfield*, 6 East. 244, 256, 102 Eng. Rep. 1280, 1285 (K.B. 1805). These views were adopted by the state courts in America. *See, e.g., Belknap* v. *Boston & Maine R. Co.*, 49 N.H. 358, 372 (1870) (where "the jury . . . acted under the influence of a perverted judgment, it is the duty of the court in the exercise of a sound discretion to grant a new trial"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N.Y. 1857).

1988), *cert. denied*, 490 U.,S. 1106 (1989).[11/] The Seventh Circuit has held that "If a verdict is the result of appeals to passion and prejudice, the trial court must unconditionally order a new trial and cannot give the plaintiff an option to accept a lesser amount." *Dorin* v. *Equitable Life Assurance Society*, 382 F.2d 73, 77 (7th Cir. 1967). The Eighth Circuit similarly has stated that "[r]emittitur is not proper if the verdict is the result of passion or prejudice because passion or prejudice may affect the decision of the jury on the issue of liability as well as damages." *Everett* v. *S.H. Parks & Associates, Inc.*, 697 F.2d 250, 253 & n. 5 (8th Cir. 1983). And the Tenth Circuit has carefully distinguished between jury passion or prejudice, which requires a new trial, and a merely "excessive damage award" which may be cured by remittitur. *Melandris* v. *Merrill Lynch*, 703 F.2d 1152, 1168 (10th Cir. 1981), *cert denied*, 464 U.S. 824 (1983). See also *Urseth* v. *City of Dayton*, 680 F. Supp. 1150, 1152-1153 (S.D. Ohio 1987) ("remittitur is not proper if the verdict was excessive *and* the product of passion and prejudice, since prejudice may well have affected the decision of the jury on liability as well as damages. In those instances, a complete new trial is required"), citing *Chester Park Co.* v. *Schulte*, 120 Ohio St. 273, 166 NE 186 (1929); *Rosera* v. *International Harvester Co.*, 109 F.R.D. 143, 153 (E.D. Wisc. 1986) (". . . it is unmistakably clear that remittitur may not be employed to cure what the court views as an excessive verdict that results from passion, prejudice or caprice"); *Tennis* v. *General Motors*, 625 SW2d 218, 229, 26 ALR 4th 350, 366 (Mo.App. 1981) ("Excessive verdicts are of two sorts, *i.e.*, those which are simply excessive and those whose excessiveness results from jury misconduct through passion and prejudice. . . . Simple excessive is curable by required remittitur . . . On the other hand, excessiveness because of bias and prejudice mandates a new trial"); 6A *Moore's Federal Practice*, ¶ 59.08 [7], pp. 59-197, 59-

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[11/] See also *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 717 (5th Cir. 1965); *Wells* v. *Dallas Independent School District*, 793 F.2d 679, 683-84 (5th Cir. 1986).

198 (2nd ed. 1992) ("If the verdict is the result of passion or prejudice . . . the trial court *must* unconditionally order a new trial and cannot give the plaintiff the option to accept a lesser amount") (emphasis in original).

The courts of California are divided over whether to follow the rule enunciated by the above cases. While one California court has stated that where "the jury arrived at an excessive verdict from passion and prejudice, we doubt the propriety of conditioning the order for new trial on the acceptance of remittitur", *Collins* v. *Lucky Markets, Inc.*, 274 Cal.App.2d 645, 79 Cal.Rptr. 454, 460 n.3 (1969), and while the California Supreme Court at least once stated that "any doubts should be resolved in favor of granting a new trial", *Liodas* v. *Sahadi*, 19 Cal.3d 278, 285-86, 137 Cal.Rptr. 635, 639, 562 P.2d 316 (1977), the cases are legion in which the California appellate courts have failed to vacate verdicts resulting from passion and prejudice and instead have simply reduced them, without analysis of the propriety of doing so under due process. These courts often have stated only that the reduction is "to do justice," or a similar formulation, without any discussion of how the court determined that an unprejudiced jury would have found liability on the part of the defendant or awarded the reduced amount. *See, e.g., Las Palmas Associates* v. *Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301, 322 (Cal. App. 1991) ($10 million punitive damage award reduced, as "any amount higher than $2 million would certainly be the result of passion and prejudice"); *Little* v. *Stuyvesant Life Ins. Co.*, 67 Cal. App. 3d 451, 470, 136 Cal. Rptr. 653, 664 (Cal. App. 1977) (jury award infected by passion and prejudice; "justice will be best served" by reducing punitive damage award, rather than vacating it, without further explanation); *Rosener* v. *Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 753, 168 Cal. Rptr. 237, 245 (Cal. App. 1980), *app. dism'd*, 450 U.S. 1051 (1981) (same; "modify . . . to do justice"); *Goshgarian* v. *George*, 161 Cal. App. 3d 1214, 1230, 208 Cal. Rptr. 321, 331-32 (Cal. App. 1984) (same).

Similarly, at least several federal courts have not strictly applied the new trial rule enunciated in *Moquin* and its progeny. *Cf.*, *Auster Oil & Gas, Inc.* v. *Stream*, 835 F.2d 597, 604 n. 6 (5th Cir. 1988) (court held passion and prejudice infected only punitive damages and thus ordered new trial only on that issue; no discussion of standards applied, except to state "from our review of the record"); *The Post Office* v. *Portec, Inc.*, 913 F.2d 802, 811 & n. 3 (10th Cir. 1990) (court found punitive damage award caused by passion and prejudice and ordered a remittitur of punitive damages only; sole discussion as to liability and compensatory damages was that "[w]e do not, however, conclude that the original liability determination was tainted"), *vacated as moot*, 935 F.2d 1105 (10th Cir. 1991).

The lack of explicit reasoning in these cases makes clear that where a punitive damage award is the result of jury passion and prejudice, the California courts, including the court below, and some federal courts have rejected, ignored or rendered meaningless the rule of *Moquin*, which necessarily is grounded in due process. Once a court has found that a verdict in any way is based on passion and prejudice, it is improper for the court to aggregate to itself the jury's determination of whether to impose, or the amount of, damages. A court cannot presume that a dispassionate jury would have found liability or imposed any amount of damages. This is especially true with respect to punitive damages, whose determination is a matter wholly within the discretion of the jury. McCormick, *Damages* § 84, p. 296 (1935) ("jury . . . has entire discretion to refrain from giving any punitive damages at all even though all the elements of malicious and damaging misconduct may have been fully established"); *Brewer* v. *Second Baptist Church*, 32 Cal. 2d 791, 800-01, 197 P.2d 713 (Cal. 1948); B. Witkin, *Summary of California Law* § 1373, at 840 (9th ed. 1988); *cf.*, *Shu-Tao Lin* v. *McDonnell Douglas Corp*, 742 F.2d 45, 50 (2d Cir. 1984) (where prejudicial error has infected jury's entire consideration of compensatory damages, remittitur is improper as it

"disregards the jury's verdict entirely and deprives the defendants of their right to trial by jury").[12/]

When a court reduces damages in passion and prejudice cases, it engages in mere speculation as to what damages an unprejudiced jury would have imposed, or even that it would have found for plaintiff. As the Fifth Circuit stated, when an award based upon passion and prejudice is reduced significantly, "we find it difficult to regard the . . . remnant of [the] verdict as in any sense a product of the jury. It was the judge's verdict; a new trial is called for." *Wells* v. *Dallas Independent School District*, 793 F.2d at 684 (5th Cir. 1986). Certainly, there may be some narrow exceptions to the principle enunciated in *Moquin* requiring a new trial on all issues when a verdict is based on passion and prejudice. For example, even when the verdict may have been the result of passion or prejudice, a complete new trial on liability may not be required where liability is conceded or where the facts going to liability would have *required* summary judgment or a directed verdict. See, e.g., *De Leon Lopez* v. *Corporacion Insular de Seguros* , 931 F.2d 116, 125 (1st Cir. 1991) (where district directed verdict of liability, passion and prejudice of jury could not have influenced outcome of liability). In such an exceptional situation, not present here, it would be proper to remand for a new trial

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[12/] Judicial speculation as to what an unprejudiced jury *might* have done is particularly inappropriate in cases involving unconventional groups, such as a minority religion, where heightened judicial protection is required. This Court repeatedly has warned against the dangers of hostile, impassioned juries imposing massive damages against unconventional groups and viewpoints, *see, e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988), and the history of public opprobrium against new, minority religions, *see Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947), regrettably continues to this day. See *Church of Scientology Flag Service Organization* v. *City of Clearwater*, 2 F.3d 1514, 1531 (11th Cir. 1993) ("The record shows a widespread political movement, apparently driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater").

solely on compensatory and punitive damages.[13] However, in light of the fact that an award of punitive damages is wholly within the discretion of the jury, under *Moquin* and its progeny a new trial on punitive damages is always required in verdicts based on passion or prejudice.

Certiorari should be granted to conform the practice of the California courts to the rule established by this Court in *Moquin* and *Butts* and followed by most federal circuits and state courts, that a new trial is required where a jury verdict is the result of passion or prejudice.

II. The Decision of the Court of Appeal Is in Fundamental Conflict with the Decisions of This Court and Other Appellate Courts Holding that a Judgment Must Be Reversed Where It May Have Rested Upon Grounds Impermissible Under the First Amendment.

It is indisputable -- in fact Wollersheim acknowledged in his petition for review to the California Supreme Court from the first decision of the Court of Appeal -- that this case was tried upon the theory that Wollersheim's exposure to the religious speech and the peaceful religious practice of auditing was itself actionable as "outrageous conduct". Wollersheim claimed that his initial encounters with auditing caused him to become "psychologically dependent" upon and "addicted" to the practice, and that he thus continued to participate in it despite the fact that it purportedly caused him severe emotional distress. The jury was invited to and did assess millions of

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[13] Moreover, in a situation where liability is indisputable, and in addition the compensatory damages which flow from liability are a mere matter of calculation, *e.g.*, a claim where the damages can be established as a matter of law, there would be no need for a new trial on compensatory damages. 6A *Moore's Federal Practice* ¶ 59.08[7] at pp. 59-199, 59-201 (2nd ed. 1992). In such a case, a new trial would be required only on punitive damages.

dollars in damages based upon a conclusion that plaintiff's exposure to auditing -- *i.e.*, religious speech -- was "outrageous".

The trial of this case thus directly raised the question whether the state may draw the line between protected and unprotected religious speech and practices through the subjective application by juries of the concept of "outrageous conduct". In *Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988), this Court held that a highly offensive parody of a public figure could not be actionable under a claim of intentional infliction of emotional distress. The Court concluded that there was no "principled standard" to separate the parody from more traditional political cartoons in terms of constitutional protection, *id.* at 55, and stated that, "we are quite sure that the pejorative description `outrageous' does not supply one." *id.*

The Court's fear that the "inherent subjectiveness" of the term "outrageous" "would allow a jury to impose liability on the basis of the jurors' tastes or views or perhaps on the basis of their dislike of a particular expression," *id.*, is even more apt where religious belief and practice are at issue. Religious beliefs tend to be among the most strongly held and exclusive points of view, and they uniquely engender controversy, hostility, rivalry and prejudice. It is objectively unreasonable to expect that jurors will be able to put aside their own sacred beliefs and biases when confronted with opposing or novel religious claims, especially given the well-known history of public opprobrium for unconventional religious societies. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 8-14 (1947); *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 116 (1943); *Church of Scientology Flag Service Organization* v. *City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) (Finding substantial evidence that City ordinance was enacted and gerrymandered for purpose of driving Church out of Clearwater). Certainly, the "pejorative description `outrageous' does not supply" the principled standard to distinguish constitutional from unconstitutional religious speech or peaceful religious practices, any more than in the realm of political speech. Just as *Falwell*

rejected tort liability for *emotional* injury from political speech, the First Amendment forbids recovery for emotional injury caused by exposure to religious speech or voluntary participation in peaceful religious practices.[14]

The Court of Appeal in this case recognized that Wollersheim's tort claim would be barred by the First

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[14] The question whether ex-members may recover for intangible or emotional distress torts arising out of religious speech or peaceful religious practices continues to arise with increasing frequency in the lower courts, with inconsistent results. Those courts that have rejected such claims have recognized that the First Amendment protects religious speech and peaceful practices, particularly with respect to the relationship between a church and a member or ex-member. *See, e.g., Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875, 880, 883 (9th Cir. 1987) (Jehovah's Witnesses cannot be held liable for "intangible emotional torts" for the religious practice of "shunning"); *Orlando* v. *Alamo*, 646 F.2d 1288, 1290 (8th Cir. 1981) (Church's indoctrination program not actionable); *Meroni* v. *Holy Spirit Association*, 119 A.D. 2d 200, 506 N.Y.S. 2d 174, 177 (2nd Dept. 1986)(same); *Lewis* v. *Holy Spirit Assn.*, 589 F.Supp. 10, 12 (D. Mass. 1983) (same); *Christofferson* v. *Church of Scientology*, 57 Or.App. 203, 644 P.2d 577, 590, *pet. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1206 (1983) (Scientology religious practices, including auditing and "disconnect", not actionable); *Guinn* v. *Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (First Amendment prohibits tort liability for ecclesiastical discipline imposed upon member, but not discipline imposed after member departed church).

Other courts, however, have held that such claims are actionable. *Bear* v. *Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105, 107-08 (1975) (suggesting that "shunning" may be actionable); *O'Neil* v. *Schuckhardt*, 112 Idaho 472, 733 P.2d 693, 699-701 (1986) (intensive prayer, fasting and isolation from community held to state cause of action against conservative, schismatic Catholic church); *Carrieri* v. *Bush*, 69 Wash. 2d 536, 419 P.2d 132, 135-137 (Wash. 1966) (threats of damnation, along with ill will and "reckless" recommendations of family separation based on biblical interpretations render pastor liable for alienation of affections).

As explained in the text, the Court of Appeal in the instant case held that, absent force or secular coercion, auditing *is* protected activity. The court did not decide whether "shunning" or "disconnect" policies are protected. Thus, the question presented here is whether, given the Court of Appeal's decision that auditing *is* protected activity, a new trial was required because of the likelihood that the jury based its verdict on such protected activity.

Amendment if it rested upon the theory that auditing, *per se*, constituted outrageous conduct (which, of course, was precisely Wollersheim's theory): "[The Constitution] cannot tolerate lawsuits which might chill religious practices --*such as auditing*, `hell fire and damnation' preaching, confessions and the like -- where the only harm which occurs is emotional injury to the psychologically weak" (59a) (emphasis added).

The Court of Appeal did not deny that the "auditing *per se*" theory was presented to the jury, or that it, at the least, may have been the basis for the jury's verdict. Indeed, the Court of Appeal ignored the fact that the Church sought a jury instruction that auditing, *per se*, could not be the basis for a finding of tortious conduct, which was refused (App. A305, 309-10, 312). Rather, the Court of Appeal found that there was evidence from which the jury could have based its verdict on the ground that Wollersheim was compelled by force or secular threats to participate in auditing (60a). The court affirmed the judgment exclusively upon the possibility that the jury's verdict rested on such a secular coercion theory, despite the fact that the jury was not instructed on such a theory.

The Court of Appeal thus turned upside down the rule uniformly applied in First Amendment cases requiring reversal of a general verdict if the verdict may have rested upon grounds protected by the First Amendment. *See, e.g., Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931): *Gregory* v. *City of Chicago*, 394 U.S. 111, 113 (1969); *id.* at 123-124 (Black, J., concurring); *Street* v. *New York*, 394 U.S. 576, 586-590 (1969); *Thomas* v. *Collins*, 323 U.S. 516, 528-29 (1945). This Court explicitly applied the rule to state court civil tort proceedings in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 289 (1964); *see also United Mine Workers* v. *Gibbs*, 383 U.S. 715, 732-35 (1966); *NAACP* v. *Claiborne Hardware, Co.*, 458 U.S. 886, 917-18 (1982). And other lower federal and state appellate courts have applied the rule in religious free exercise cases, in dramatic contrast to the decision below. *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 (D.C. Cir.), *cert denied*,

396 U.S. 963 (1969) (where a jury's general verdict *may* have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible, grounds); *Christofferson* v. *Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, 603-05 (1982).

In the present case, rather than reversing because the jury *may* have (indeed almost certainly) found liability on the basis of constitutionally protected activity such as auditing, the Court of Appeal affirmed because it purportedly found some evidence of unprotected activity that *might* support a verdict for intentional infliction of emotional distress.[15/]

The Court of Appeal also ignored the related constitutional doctrine that a civil judgment must be reversed when the damages awarded have not been explicitly limited to those proximately caused by the unprotected conduct. *See, e.g. Gibbs*, 383 U.S. at 730, 735. In the closely analogous *Claiborne Hardware* case, this Court held that "the nonviolent elements" of the defendants' politically motivated economic boycott were protected by the First Amendment, 458 U.S. at 915, and that "[o]nly those losses proximately caused by unlawful conduct may be recovered." 458 U.S. at 918. Noting the hopeless admixture of evidence of business losses resulting from protected and unprotected activity, the Court reversed on the ground that the

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[15/] It is a virtual certainty that the jury did not rest its decision on the Court of Appeal's secular coercion theory, because that theory was never presented to it. But even if the possibility exists that the jury might have applied this theory on its own, the verdict *must* be overturned, because the jury was not *limited* to, or even informed of, the coercion theory, and because the jury was not instructed that it could *not* base its verdict upon Wollersheim's participation, *per se*, in auditing. The jury therefore may (indeed, was extremely likely to) have rested its decision on the constitutionally impermissible grounds that the religious practices of auditing and disconnect *per se* were outrageous and actionable, as Wollersheim's counsel argued and as presented in the testimony of Wollersheim and his expert witnesses.

judgment may have rested, at least in part, on the defendants exercise of their First Amendment rights:

> It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

458 U.S. at 923.

The purpose of the above rules is to insure that out of the complex maelstrom of jury trials, persons are not subject to judgments or damages for engaging in First Amendment protected activities, *even if* they *may* also have engaged in unprotected activities for which they may be liable. Application of such rules of appellate review compels litigants and trial courts to limit the claims presented to juries to those not barred by the First Amendment, and to make clear to juries through precise instructions that they cannot impose judgments based upon protected activities.

Because the jury in this case, as in *Claiborne Hardware* and *Gibbs*, was not carefully instructed that it could award damages only for injuries proximately caused by violence or threats of violence, or, at the least, from improper coercive activities, and because of the hopeless admixture of protected and purportedly unprotected activity, "[i]t is impossible to conclude that state power has not been extended to compensate [Wollersheim] for the direct consequences of nonviolent, constitutionally protected activity." 458 U.S. at 923. Certiorari should be granted to insure that the necessary rule of *Gibbs* and *Clairborne Hardware* is applied explicitly to religious speech and free exercise cases.

III. The Decision of the Court of Appeal Is in Fundamental Conflict with the Decisions of This Court Holding That an Appellate Court Must Engage in Independent Review of the Record Where a Judgment Is Based Upon Activity Ordinarily Protected by the First Amendment.

The Court of Appeal acknowledged that the provision of auditing ordinarily is protected by the First Amendment, but "stripped away" (53a) the Church's First Amendment protection in this case because it held that there was evidence upon which the jury could have found that the auditing was provided in a context of physical coercion and secular threats. In so holding, the court simply concluded there was "substantial evidence" to support its invented "coercion" theory (45a). Even if this may be an appropriate standard of review in an ordinary tort case, when First Amendment interests are at stake, this Court requires that an appellate court engage in an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion into activities protected by the First Amendment. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Had the court undertaken the constitutionally mandated independent review of the evidence, it could not have upheld a finding of liability on this record.

The independent review standard mandates that the appellate court "is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Bose*, 466 U.S. at 509-10. The mere fact that "the jury was properly instructed [which it was not in this case] and there is some evidence to support its finding," does not insulate a jury verdict from independent review. *Id.* at 507 (bracketed material added). The independent review requirement ensures that the fact finder has not improperly

"cross[ed] the constitutional threshold that bars the entry of any judgment." *Id.* at 511.

The independent review standard does not require independent review of every factual issue in the case, but only of those contextual factual issues which determine whether activity is within or without the zone of First Amendment protection. Thus, the *Bose* Court noted that independent review is required to determine actual malice in a defamation action (*New York Times. Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964); whether a motion picture is obscene (*Jenkins* v. *Georgia*, 418 U.S. 153, 159-61 (1974)); and whether speech was likely to incite imminent lawless action (*Hess* v. *Indiana*, 414 U.S. 105, 108,09 (1973)), or to cause an actual breach of the peace (*Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963)).[16] *Bose*, 466 U.S. at 506-08.

Application of the standard is well illustrated by *Claiborne Hardware*, *supra*, where the question was whether and to what extent acts of violence and threats had coerced participation in a politically motivated economic boycott, thereby stripping First Amendment protection from all or part of the boycott activities. The Court held that the "fact that such activity is constitutionally protected [but for the alleged violent coercion] . . . .imposes a special obligation on this Court to examine critically the basis on which liability was imposed," 458 U.S. at 915, requiring the court to carry out an "independent examination of the entire record" to ensure that the judgment did not violate First Amendment standards. *Id.* at 915, n.50.

Here, the Court of Appeal acknowledged that non-coerced auditing is protected by the First Amendment (59a), just as a non-violent boycott was deemed protected in *Claiborne*

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[16] The Court also approvingly cited the application of independent evidentiary review in *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940) (free exercise of religion); *Street v. New York*, 394 U.S. 576, 592 (1969) (fighting words); *Fiske* v. *Kansas*, 274 U.S. 380, 385-87 (1927) (advocacy of violence).

Hardware. The question here became whether and to what extent purported acts of coercion stripped First Amendment protection from the auditing activities, just as in *Claiborne Hardware* the question was whether and to what extent violence and threats of violence deprived the boycott activities of First Amendment protection. In sharp contrast to this Court's review in *Clairborne Hardware*, however, the Court of Appeal here did not independently examine the record, "critically" or otherwise, but instead merely determined (without reference to a single record fact) that the jury *may* have found "substantial evidence" to support the coercion theory, which, unlike *Claiborne Hardware*, was not even presented to the jury *at all*. As is made clear from the statement of the case, independent review of the record would not have permitted the Court of Appeal to affirm on the basis of its coercion theory. Searching review of the record in cases such as this is an absolute necessity to insure that the substantive protections of the First Amendment are applied in a meaningful fashion.

Conclusion

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

Eric M. Lieberman
Counsel of Record
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman, P.C.
740 Broadway, 5th Floor
New York, NY 10003-9518
(212) 254-1111

Michael Lee Hertzberg
740 Broadway-Fifth Floor
New York, NY 10003
(212) 982-9870

Attorneys for Petitioner
Church of Scientology of
California

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

No. 2/7 B023193-S011790

Filed July 15, 1993

LARRY WOLLERSHEIM,

Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Appellant.

Pursuant to Rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Second Appellate District, Division Seven.

LUCAS
Chief Justice

MOSK
Associate Justice

PANELLI
Associate Justice

KENNARD
Associate Justice

ARABIAN
Associate Justice

BAXTER
Associate Justice

GEORGE
Associate Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

No. 2/7 B023193-S011790

Filed July 23, 1992

LARRY WOLLERSHEIM,

Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Appellant.

Petition for review GRANTED.

Submission of additional briefing, otherwise required by Rule 29.3, California Rules of Court, is deferred pending further order of the court.

ARABIAN
Acting Chief Justice

KENNARD
Associate Justice

BAXTER
Associate Justice

GEORGE
Associate Justice

APPENDIX C

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT—DIVISION SEVEN

B023193

(LASC No. C332827)

Filed March 20, 1992

LARRY WOLLERSHEIM,

Plaintiff and Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Swearinger, Judge. Affirmed in part and reversed in part with a remittitur.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman and Eric M. Lieberman and Terry Gross, Lenske, Lenske & Heller and Lawrence E. Heller, and Michael Lee Hertzberg for Defendant and Appellant.

Cummins and White, Barry van Sickle, Robert S. Horvitz, and Tina B. Fisher for Plaintiff and Respondent.

This case is on remand from the United States Supreme Court to reconsider the punitive damage award modified and approved in our earlier opinion (*Wollersheim* v. *Church of*

Scientology (1989) 212 Cal.App.3d 873, *rev. den.* Oct. 26, 1989, *cert. grtd., vac. and remd.* (1991) 111 S.Ct. 1298.) in the light of the high court's decision in *Pacific Mut. Life Ins. Co.* v. *Haslip* (1991) 111 S.Ct. 1032. To facilitate review of this question, we ordered supplemental briefing and heard oral argument from the parties. Upon reconsideration, we conclude the California procedures for calculating punitive damage awards pass constitutional muster under *Haslip*. We further conclude, as we did in our prior opinion, the jury acted appropriately in imposing a punitive damage award in this case but the amount it awarded is excessive under the standards established by California law. Consequently, we affirm the judgment, subject to a remittitur.[1]

I. *THE PROCEEDINGS THUS FAR*

The original appeal followed a jury award of $30 million in compensatory and punitive damages to Larry Wollersheim (Wollersheim), a former member of the Church of Scientology (Scientology). The complaint alleged Scientology intentionally and negligently inflicted severe emotional injury on Wollersheim through certain practices, including "auditing," "disconnect," and "fair game." Since the trial court granted summary adjudication that Scientology is a religion and "auditing" is a religious practice, the trial proceeded under the assumption they were. In our original opinion we concluded there was substantial evidence to support a finding Scientology had committed the tort of intentional infliction of emotional injury against Wollersheim. We also found sufficient evidence the "auditing" and other practices in this case were conducted in a coercive environment. Thus, none of them qualified as "*voluntary* religious practices" entitled to constitutional pro-

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[1] Our prior opinion dealt exhaustively with the tort, freedom of religion, evidentiary and procedural issues appellant raised in its appeal. Our rationale for and disposition of those issues remain the same. We see no virtue in repeating that discussion in this opinion. Accordingly, except as we may touch some of these topics tangentially in the course of addressing the question of the punitive damages award and its constitutionality, as to all these issues the original opinion remains and is incorporated intact and unaltered in this decision. The punitive damages section and the disposition paragraph of the original opinion, however, are replaced in their entirety by this opinion.

tection under the First Amendment religious freedom guarantees. At the same time, we concluded both the compensatory and punitive damages the jury awarded in this case were excessive. Consequently, we reduced the compensatory damages to $500,000 and the punitive damage award to $2 million.

The California Supreme Court denied the petitions for review unanimously. (Oct. 26, 1989.) The United States Supreme Court, however, granted certiori on the punitive damages issue and held this case along with ten others (see fn. 4, *infra*) awaiting its disposition of the lead case on the constitutionality of punitive damages—*Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 111 S.Ct. 1032. After deciding *Haslip*, the Supreme Court remanded all 11 punitive damage cases it was holding for the lower courts to review in light of *Haslip*.

Since the *Haslip* opinion was limited solely to the issue of the constitutionality of punitive damage awards, our reconsideration of our prior decision likewise is confined to that issue.[2] We first

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[2] After this court filed its original opinion in the instant case the United States Supreme Court decided *Employment Div. Dept. of Human Res. of Oregon* v. *Smith* (1990) 110 S.Ct. 1595. In this decision, the high court altered the constitutional standard for judging whether a state law which impinges on a citizen's free exercise of religion violates the First Amendment. No longer must there be a compelling interest in applying the state law to those whose religion prohibits compliance. After *Smith* it is sufficient the law is a valid, neutral law of general applicability and not aimed at a specific religion or at religion in general. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,' (citation omitted)—contradicts both constitutional tradition and common sense." (*Id.* at p. 1603.)

The California Supreme Court presently has before it the issue whether the religious guarantees of the state Constitution are to fall into line with the *Smith* decision. Our state's highest court recently granted review of an appellate decision holding the "compelling state interest analysis still applies under state constitutional law." (*Donahue* v. *Fair Employment Housing Comm.* (1991) 1 Cal.App.4th 387, 401, *rev. gr.* Feb. 27, 1992. See also *People* v. *Woody* (1964) 61 Cal.2d 716 and *Molko* v. *Holy Spirit Assn.* (1988) 46 Cal.3d 1092, pre-*Smith* decisions applying compelling interest balancing test to free exercise issues and arguably decided under California Constitution as well as United States Constitution.)

We need not reenter this particular thicket, however. To the extent we reached that step of the analysis, this court applied the compelling interest test to its review of the constitutionality of imposing tort liability on Scientology's

review the procedures and standards California courts apply in deciding the appropriateness and amount of punitive damage awards and determine whether that process is constitutional under *Haslip*. We then examine the specific punitive damage award in this case, as reduced by this court, and determine whether it passes constitutional muster.

II. *THE PROCESS CALIFORNIA USES FOR DETERMINING AND REVIEWING PUNITIVE DAMAGE AWARDS IS CONSTITUTIONAL UNDER THE RECENT UNITED STATES SUPREME COURT DECISION IN PACIFIC MUTUAL INSURANCE CO.* V. *HASLIP*

This court and other California appellate courts already have ruled this state's procedures for determining punitive damages comply with the "due process" standards enunciated in *Haslip*. (*Liberty Transport, Inc.* v. *Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417; *Las Palmas Associates* v. *Las Palmas Center* (1991) 235 Cal.App.3d 1220.) None of these opinions, however, had occasion to consider this question in depth. Consequently, we examine the *Haslip* opinion in some detail and the Alabama punitive damages procedures approved in that decision as background for reviewing the punitive damage award the jury levied on Scientology. As further background for our review, we also have included an appendix containing a table of appellate opinions in which California courts evaluated punitive damage awards. This table updates a similar table which appears in *Devlin* v. *Kearney AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App.3d 381, 393-396.

"fair game," "disconnect," and "auditing" practices. (See *Wollersheim* v. *Church of Scientology, supra*, 212 Cal.App.3d at pp. 887-899.) For the most part, as will be recalled, we found these activities were not constitutionally protected religious practices because Wollersheim was coerced into participating in them. Accordingly, in most instances it was unnecessary to ask the next question—whether the state had a "compelling interest" which overrode the "*free* exercise" concerns. Where that question was reached, however, we used the stricter, pre-*Smith* standard. Having upheld the constitutionality of the state's tort laws under this tougher standard, it is unnecessary to reconsider whether those laws would survive the lesser standard suggested in *Smith*. For the same reason, we also need not bother pondering the intriguing question whether the religious guarantees of the state Constitution will continue to impose a compelling interest test on state laws of general application even though the federal Constitution no longer does.

In *Haslip* an insurance agent was accredited by at least one other insurance carrier as well as the defendant, Pacific Mutual. The plaintiffs were employees of a company this agent signed up for a group combined health and life insurance policy. Pacific only supplied the life insurance portion of this policy and another of this agent's companies provided the health insurance component. Later the agent embezzled premiums plaintiffs' employer had forwarded to him instead of paying them over to the insurance companies. The policies were cancelled. So when these plaintiffs became sick they suddenly and unhappily found out they had no health coverage. (111 S.Ct. at p. 1036.)

The plaintiffs sued the agent and Pacific for fraud. The other three plaintiffs only received compensatory damages, but Haslip won "general damages" in the amount $1,040,000. (111 S.Ct. at p. 1037.) The Supreme Court concluded at least $840,000 of this represented punitive damages. (*Id.* at fn. 2.) Pacific appealed and the Alabama Supreme Court affirmed, including the punitive damages portion of the award, by a divided vote. After granting certiori the United States Supreme Court also affirmed in a majority opinion signed by five Justices. Two Justices separately concurred and one dissented. (The ninth Justice did not participate in the decision.)

In assessing the constitutionality of the punitive damages award in *Haslip*, the United States Supreme Court traced the long history and important role of punitive damages in Anglo-American law. On the basis of this historical review, the high court ruled, "So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. [Citation omitted.] In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional." (*Id.* at p. 19.)

Having ruled punitive damages awards are constitutional in concept, the Supreme Court considered whether the specific award in the *Haslip* case was constitutionally acceptable. The

justices set forth the general considerations that are to guide the decision of whether a specific award is constitutional. "[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. . . . [G]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." (*Id.* at p. 20.)

The Supreme Court described several attributes of the Alabama process for determining punitive damage awards and, on that basis, concluded "the award here did not lack objective criteria. . . . [I]n this case it does not cross the line into the area of constitutional impropriety." (*Id.* at p. 23.) The high court did not, however, hold nor imply the Alabama process was the one and only system which accords due process. Nor did it suggest any particular attribute of the Alabama process was absolutely essential to constitutionality.[3] All the Supreme Court held was that the Alabama process achieved the constitutional requirement of "reasonableness" and "adequate guidance to the jury."[4]

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[3] "Other than explaining that Alabama's procedure passes constitutional muster, *Haslip* offers little guidance as to what would be necessary to render a different system unconstitutional." (*George* v. *International Society for Krishna Consciousness of California, etc.* (1992) ____ Cal.App.3d ____, ____ (4 Cal.Rptr. 2d 473, ____, 92 D.A.R. 1593, 1611.)

[4] It is clear that we are not alone in construing *Haslip* to allow a variety of punitive damage systems which do not necessarily mimic the Alabama system under review in that particular case. According to our research, four of the eleven cases the Supreme Court remanded after *Haslip* have been decided thus far and another sixteen other cases (other than those decided by California courts) have considered the constitutionality of their state punitive damages processes under the *Haslip* opinion.

In all four remanded cases the courts upheld the state punitive damages system under review and affirmed the particular award. Thus, the punitive damages procedures of Alabama, Georgia, and Mississippi as well as California have passed constitutional muster at least at the first level of appeal in these remanded cases. (Alabama: *Southern Life and Health Insurance Co.* v. *Turner* (Ala. 1991) 586 So.2d 854; Georgia: *Hospital Authority of Gwinnett County* v. *Jones* (Ga. 1991) 261 Ga. 613, 409 S.E.2d 501; California: *George* v. *International Society for Krishna Consciousness of California, supra,* ____Cal.App.3d ____, 92 D.A.R. 1593); Mississippi: *Eichenseer* v. *Reserve*

The Supreme Court found several features of the Alabama process worthy of mention. We consider each and consider how the Supreme Court's observations about Alabama criteria and procedures relate to the constitutionality of California's punitive damages process.

Life Ins. Co. (5th Cir. 1991) 934 F.2d 1377.) Of the 16 other cases evaluating the constitutionality of punitive damages awards under *Haslip*, 11 upheld the jurisdiction's process and the specific award outright, two upheld the process but found the specific award excessive (as we do in the instant case), and 3 found their state's process defective in some way. In total, in these 16 cases state or federal courts have applied *Haslip* and approved the punitive damages procedures in 10 states (in addition to California): Alabama (once again): *Yamaha Motor Co. Ltd.* v. *Thornton* (Ala. 1991) 579 So.2d 619; *Killough* v. *Jahandarfard* (Ala. 1991) 578 So.2d 1041; *Braswell* v. *Congra, Inc.* (11th Cir. 1991) 936 F.2d 1169; Louisiana: *Galjour* v. *General American Tank Car Corp.* (E.D.La. 1991) 764 F.Supp. 1093; Minnesota: *Bradley* v. *Hubbard Broadcasting, Inc.* (Minn.App. 1991) 471 N.W.2d 670 [procedure approved although specific award found excessive]; Missouri: *Wolf* v. *Goodyear Tire & Rubber Co.* (Mo.Ap. 1991) 808 S.W.2d 868; Oregon: *Oberg* v. *Honda Motor Co.* (Or.App. 1991) 814 P.2d 517; Pennsylvania: *Coyne* v. *Allstate Insurance Co.* (E.D. Pa. 1991) 771 F.Supp. 673; South Carolina: [*Gamble* v. *Stevenson*, (S.C. 1991) 406 S.E.2d 350; Texas: *Glassock* v. *Armstrong Cork Co.* (5th Cir. 1991) 946 F.2d 1085; *State Farm Mutual Auto Insurance Co.* v. *Zubiate* (Tex.App. 1991) 808 S.W.2d 890 [procedure approved although specific award found excessive]; Wisconsin: *Heideman* v. *American Family Ins. Group* (Wis.App. 1991) 473 N.W.2d 14; Arkansas: *Robertson Oil Co., Inc.*, v. *Phillips Petroleum Co.* (W.D.Ark. (1991) 779 F.Supp. 994.

Several of these courts found procedures constitutional which deviated substantially from the Alabama punitive damage system approved in *Haslip*. For instance, the Fifth Circuit held the Texas procedure constitutional even though juries and courts only consider three factors—nature of the wrong, degree of culpability, and extent the conduct offends propriety and justice—all of them relate solely to the reprehensibility of the defendant's conduct. (*Glassock* v. *Armstrong Cork Co.*, *supra*, 946 F.2d 1085.) The Pennsylvania and Missouri procedures were found to satisfy *Haslip* even though the jury awards are reviewed for "excessiveness" without any specific, articulated standards. (*Coyne* v. *Allstate Insurance Co.*, *supra*, 771 F.Supp. 673; *Wolf* v. *Goodyear Tire & Rubber Co.*, *supra*, 808 S.W.2d 868.) And, the Oregon procedure was approved even though the state Constitution severely limits the review of jury awards of punitive damages by allowing reversal only when a reviewing court finds a lack of *any* evidence to support the award. (*Oberg* v. *Honda Motor Co.*, *supra*, 814 P.2d 517.)

A. *The Adequacy of Jury Instructions.*

The Supreme Court observed the Alabama jury instructions adequately described the purposes of punitive damages as punishing the defendant and deterring "the defendant and others from doing such wrong in the future," rather than compensating the plaintiff. The instructions gave the jury "significant discretion" in determining punitive damages, but that discretion was limited to the amount needed to advance the "state policy concerns" of "deterrence and retribution." Moreover, the degree of discretion allowed "is no greater than that pursued in many familiar areas of the law." (The Supreme Court listed several examples including "reasonable care," "due diligence," and "appropriate compensation for pain and suffering or mental anguish.") (*Id.* at pp. 1044.)

We note in the instant case the trial court gave the standard instructions on punitive damages which reflect California law on the same basic subjects as the Alabama instructions endorsed in *Haslip*. Indeed the California instructions given were, if anything, more extensive and more precise than the Alabama instructions described in *Haslip*. Not only did these instructions describe the purposes of punitive damages and distinguish them from compensatory damages, they also informed the jury the amount of damages awarded should bear a reasonable relation to the injury the plaintiff sustained and to the defendant's financial condition.

Scientology does not claim the trial court failed to give the instructions defining the purpose and scope of punitive damages which the Supreme Court found important in *Haslip*. Instead Scientology complains the trial court failed to give an instruction appellant's counsel requested which it now claims was meant to implement the corporate responsibility provision found in Civil Code section 3294, subdivision (b). This provision limits punitive damages against *corporations* to acts an officer, director, or managing agent ordered, ratified or knew about before they happened.[5]

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[5] Civil Code section 3294, subdivision (b) reads in pertinent part as follows:

Scientology's requested instruction, however, did not address the "corporate responsibility" issue covered in Civil Code section 3294, subdivision (b). The request did not mention the clause "officer, director, or managing agent" nor suggest Scientology's liability for punitive damages was limited to actions this class of agent personally did or authorized, ratified, or knew of in advance. Instead the proposed instruction advised jurors they "may not award punitive damages against the defendant Church for the intentional oppressive or malicious acts of its members, employees, or agents, unless you find that the *defendant Church of Scientology* directed, authorized, or ratified such intentional oppressive acts." As proffered, the requested instruction in no way even hinted only an "officer, director or managing agent" could make the "defendant Church of Scientology" liable for punitive damages.

It is not absolutely clear from the record why Scientology did not request such a "corporate responsibility" instruction. Perhaps it was because appellant wanted jurors to think of it as a religious "church" and not a secular "corporation." In any event, the "corporate responsibility" instruction was not relevant to the issues framed by the pleadings or raised in the evidence. Scientology did not base its defense on a contention Wollersheim's alleged injuries were inflicted by out of control lower level employees. Instead its pleadings and evidence emphasized the harmful acts, if any, were constitutionally protected religious practices. The evidence was undisputed the "auditing," "fair game," and "disconnect" actions taken in regard to Wollersheim were official practices of the Church of Scientology promulgated by its leaders, not some ad hoc aberrational acts of individual employees. Thus, it is not surprising Scientology did not bother to request an instruction it was only liable in punitive damages for what its "officers, directors, or managing agents" personally authorized or ratified.

By failing to tender a "corporate responsibility" instruction, Scientology is foreclosed under California law from claiming

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"With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice must be on the part of an officer, director or managing agent of the corporation."

the trial court committed "irreversible error" when it neglected to give such an instruction. (*Agarwal* v. *Johnson* (1979) 25 Cal.3d 932, 951 [when defendant corporation failed to tender and the trial court failed to give a "corporate responsibility" instruction in a punitive damage case] the court concluded "[the defendants] have waived their right to complain that a qualified instruction distinguishing between . . . vicarious liability for compensatory and for punitive damages should have been given.")

Despite having itself failed a "corporate responsibility" instruction during trial Scientology now claims it was denied federal "due process" under *Haslip* because the trial court also failed to give such an instruction. That the court's failure to instruct on "corporate responsibility" is not a constitutional violation under *Haslip* is apparent from the facts of that case. There the United States Supreme Court held a punitive damage award against an insurance company afforded constitutional due process even though the award imposed for liability was predicated solely respondeat superior. Indeed Alabama law, specifically found to satisfy due process in *Haslip*, permits punitive damages to be assessed against corporations without any proof the senior corporate officials authorized or ratified the offensive conduct. (*Pacific Mutual Life Ins. Co. v. Haslip*, *supra*, 111 S.Ct. at p. 1041.) Thus, it is apparent federal due process does not prohibit the imposition of punitive damages on a corporation just because the corporation's leadership remains ignorant of the egregious acts of its lesser employees or agents. It is California law—not constitutional due process—which limits corporate liability for punitive acts done, authorized, or ratified by senior corporate officials. Accordingly, the consequences for failing to give a "corporate responsibility" instruction likewise are determined under California law.

Scientology offers a further argument the failure to give this "corporate responsibility" instruction rises to the level of a federal "due process" violation. This argument likewise is without merit. It treats language in *Haslip* pointing out the "jury was adequately instructed" in that case as if the Supreme Court had held the failure to give any possibly relevant instruction in a

punitive damages case automatically violates the federal "due process" clause. For reasons explained above, while it may have been preferable for the trial court to have given a "corporate responsibility" instruction in the instant case, Scientology waived its right to complain by failing to request the instruction. Moreover, under the pleadings and evidence in this case "corporate responsibility" was not a significant issue. Consequently, the jury was "adequately instructed." The instructions the Supreme Court mentioned in *Haslip* were those the Alabama court delivered advising the jurors on the purposes of punitive damages and the criteria they were applying in fixing the amount of those damages. The trial court in the instant case gave instructions covering those same topics. That is the most *Haslip* and the "due process" clause require.

Finally, after reviewing the total evidence offered in this trial and the actual issues involved, we find that even if it were error to fail to give a "corporate responsibility" instruction that error was not prejudicial. (*Henderson* v. *Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670; *Williams* v. *Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489; see 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal § 352, pp. 355-356.) There is nothing to suggest the giving of these instructions would have substantially enhanced the chances Scientology would have prevailed.

B. *Evidence of Defendant's Financial Condition.*

The Supreme Court noted with apparent approval Alabama law *excludes* any evidence of a defendant's wealth in punitive damages cases. Thus, "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." (*Id.* at p. 22.)

For good reason, Scientology does not claim the California punitive damages process violates due process because it permitted—and now mandates—evidence of a defendant's financial condition in all punitive damages cases. (*Adams* v. *Murakami* (1991) 54 Cal.3d 105.) As our Supreme Court has pointed out, the defendant's financial condition is an essential *limitation* on the jury's discretion in this state. The jury is

instructed it may only award punitive damages which, taking account of the defendant's financial condition, are enough to punish and deter but not so high as to impair the defendant's ability to continue functioning. We do not read the United States Supreme Court opinion in *Haslip* to suggest a state punitive damages procedure which admits evidence of financial condition for this purpose and with these limiting instructions denies due process to defendants.

C. *Review of Punitive Damages at the Trial Court Level.*

In Alabama, the posttrial review of punitive damages awards at the trial court level requires the trial judge to scrutinize the amount of those awards for possible "excessiveness." The criteria the Alabama Supreme Court has set forth to guide this trial court review include "culpability of the defendant's conduct," "desirability of discouraging others from similar conduct," and "impact on the parties."

California law likewise provides for trial court review of the possible excessiveness of punitive damage awards. The criteria guiding this review, however, are more precise in many ways than the United States Supreme Court found "meaningful and adequate" in *Haslip*. As the California Supreme Court listed them in *Neal* v. *Farmers Ins. Exchange*, (1978) 21 Cal.3d 910, and as reemphasized in *Adams* v. *Murakami*, *supra*, 154 Cal.3d. 105, these criteria fall in three main categories—first, the relative egregiousness of the defendant's conduct, as measured by the consequences of its acts, second, whether the punitive damages award bears a reasonable relationship to the plaintiff's injury, and third, whether the punitive damages award bears a reasonable relationship to the defendant's financial condition—enough to punish and deter the egregious conduct, but not so much as to destroy the defendant. Nearly all of the individual factors the Alabama courts employ are subsumed under one or the other of the main categories the California courts use.

There is a slight difference between California and Alabama in the *procedure* required of trial courts after they have completed their review of a punitive damage award. According to

Haslip, Alabama requires trial judges to state their findings and reasoning on the record, whether they affirm, modify or reverse the award. (111 S.Ct. at p. 1044.) California has not had such a requirement, although trial judges frequently do so on their own.

Scientology complains the trial judge in this case denied its lengthy new trial and JNOV motions by filing a simple minute order noting those motions were "denied." Among other things, these posttrial motions raised punitive damage issues. Scientology seizes upon language in *Haslip* to the effect Alabama courts reflect "on the record" the reasons for refusing to interfere with a jury's punitive damage award. It interprets this to be a federal "due process" *requirement* and argues the trial court's failure to give a detailed account of its reasoning "on the record" denied Scientology its constitutional right.

We first observe that at no place in *Haslip* did the Supreme Court suggest a state punitive damages procedure had to match the Alabama procedure in each and every aspect if it were to satisfy federal due process requirements. (See fn. 3, *supra.*) It neither said nor implied it was essential every state require trial judges to state their reasons on the record.

Indeed the Supreme Court seemed to place far more importance on the existence of a set of criteria the trial court is to apply in judging whether the jury's verdict was excessive than whether the trial court places its reasoning on the record. After mentioning the fact Alabama requires judges to reflect their reasons on the record and then listing the criteria they are to apply in evaluating punitive damage awards, the Supreme Court emphasizes: "[This] *test* ensures meaningful and adequate review by the trial court whenever a jury has fixed punitive damages." (111 S.Ct. at p. 1044, italics added.)

In the instant case, the trial court patiently entertained a lengthy hearing on the new trial and JNOV motions which took several hours spread over several days. The judge fully heard Scientology's presentation challenging the punitive damages award. These arguments addressed the criteria California establishes for evaluating the propriety and amount of these awards. A full transcript exists of the arguments made and the evidence

relevant to evaluating the propriety and amount of punitive damages.[6] Thus the record is complete and sufficient for this court on appeal to review the jury verdict on punitive damages and the trial court's disposition of Scientology's claim those damages were excessive. The fact the trial court found it unnecessary to set forth its reasoning on the record only means the court deviated in this one detail from the procedure Alabama apparently follows. It does not mean Scientology was denied a "meaningful and adequate review" of the punitive damage award by the trial court or that it was denied due process.

The record produced in the trial court was more than ample for purposes of that court's consideration of the punitive damage award and for appellate review by this court. We would have gained little had it reflected the trial court's reasoning. Indeed that record was sufficient for this court to determine the punitive damages award should be reduced. (See p. 2, *supra*.)

The trial court here did not violate California law by failing to place its reasoning on the record nor does California law run afoul of the Constitution by failing to require this particular procedural step. This is not to say it would not be preferable practice for trial judges to do so. It is merely to conclude the failure to make a record of the reasoning behind the trial court's ruling does not deny the parties of due process under the U.S. constitution. Nor does it constitute reversible error under California law.

There is empirical evidence trial court review in California is "meaningful and adequate" which was not available or at least not mentioned by the Supreme Court in its evaluation of the Alabama process. The high court found trial court review of the punitive damages in Alabama to be "meaningful and

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[6] The posttrial hearing assumes special importance in Alabama. Unlike California, some of the facts essential to meaningful review of the punitive damages award do not appear in the trial record. In particular, Alabama law does not *permit* either party to introduce *any* evidence of the defendant's financial condition at the trial itself. In contrast, California has always allowed such evidence and now requires it. (*Adams* v. *Murakami*, *supra*, 54 Cal.3d 105.) Trial courts in Alabama accept this sort of evidence for the first time at the posttrial hearing on excessiveness of the punitive damage award. Thus, it is only the evidence introduced at this posttrial hearing which allows Alabama's trial and appellate courts to conduct a "meaningful review" of whether the damages awarded bear a reasonable relation to defendant's conduct and financial resources.

adequate" without citing any specific examples where trial courts in that state actually had reversed or reduced punitive damages awards. (The high court, on the other hand, specifically mentioned cases where such awards had been reduced at the appellate level.) (111 S.Ct. at p. 53.) By way of contrast, the tables incorporated in *Devlin* v. *Kerny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d 381 and the appendix to this opinion document numerous cases in which California trial courts have reduced punitive damages awards, a fact which reinforces our finding trial court review of punitive damages awards in California is at least as "meaningful and adequate" as is true in Alabama.

This conclusion is bolstered further by a recent Rand Corporation study of posttrial reductions of jury awards in selected California and Illinois courts.[7] (Shanley and Peterson, Posttrial Adjustments to Jury Awards (Rand Institute for Civil Justice (1987).) The study revealed verdicts which include punitive damage awards are reduced over twice as much on average as those limited to compensatory damages—by 43 percent in those with punitive damages versus 18 percent in those without. (*Id.* at pp. 38-39.)[8] Furthermore, courts reduce damage

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[7] The study was based on data from three jurisdictions—Cook County, Illinois, San Francisco County, California, and the ring of counties surrounding it, and "all California counties greater than 150,000 in population but outside the largest metropolitan areas." (Shanley and Peterson, Posttrial Adjustments to Jury Awards, (Rand Institute for Civil Justice, 1987) at p. 3., fn. 15.) (Despite their size, the latter category included cities as large as Sacramento and Bakersfield.) Although the study included a non-California jurisdiction, the authors report "[r]esults appear to vary little across the three locations in the study." (*Id.* at p. ix.) Consequently, the findings discussed in this opinion represent valid evidence of what is happening in this state.

[8] "In the 165 cases where punitive damages constituted a part of the total award, final payments were only .57 of the total. In contrast, when only compensatory damages were involved, final payments were .82 of the total. . . . This result is not just a function of the larger award size of punitive damage cases, but holds for all cases with verdicts greater than $100,000. . . . [F]or cases with verdicts between $100,000 and $999,000, those with punitive damages paid an average proportion of .61 [a *reduction* of 39 percent], while those without such damages paid an average proportion of .86 [a reduction of 14 percent]. For cases exceeding $1 million, the difference is about the same. With punitive damages the payout rate was .55 [a reduction of 45 percent], while

awards far more drastically than they are through postrial settlements—by 54 percent on average compared to 33 percent. (*Id.* at pp. 43-46.) The study further found "[m]ore of those cases [in which courts reduced damage awards] resulted from motions to the trial court than from the appeals process." (*Id.* at p. 45.) Thus, this empirical data supplies strong evidence California trial courts afford "meaningful and adequate" review of punitive damages awards in practice as well as theory.

D. *Review of Punitive Damages at Appellate Level.*

The United States Supreme Court also emphasized the Alabama Supreme Court conducted its own review of the possible excessiveness of the punitive damage award. California likewise provides one and sometimes two levels of appellate review of these awards.

By the time of its review of the *Haslip* award the list of criteria the Alabama high court applied had been refined to include the "relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred," "degree of reprehensibility" and "duration" of that conduct, "defendant's awareness" or "concealment" of the conduct, "existence and frequency of past conduct," "profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a lost," defendant's "financial position," "all costs of litigation," and "imposition of criminal sanctions" or "other civil awards . . . for the same conduct . . . these also to be taken in mitigation." (111 S.Ct. at p. 1045.)

Most but not all of the above criteria are subsumed in the three major categories of criteria California appellate courts as well as trial courts apply in reviewing punitive damages

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without punitive damages the payout was .76 [a reduction of 24 percent]. (Shanley and Peterson, Posttrial Adjustments to Jury Awards, *supra*, at p. 38.)

These findings are corroborated by another Rand study which was confined to punitive damage cases in San Francisco, California, and Cook County, Illinois. That study reported punitive damages were reduced an average 50 percent in the sample it covered from the 1979-1983 period. (Peterson, Sarma and Shanley, Punitive Damages: Empirical Findings (Rand Institute for Civil Justice (1987).)

awards. The United States Supreme court did not hold or imply that each and every one of the criteria the Alabama Supreme Court now applies is essential to due process. It merely held this particular set of criteria was sufficient to satisfy due process, not that another set would fail to do so. The nation's high court emphasized Alabama's appellate review "ensure that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages . . . . Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket . . . . [¶] The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." (111 S.Ct. at pp. 1045-1046.)

Scientology complains the California criteria do not specifically highlight two factors it deems important—"impact on innocent third parties," and "punitive damage awards imposed in prior cases for the same conduct." Nothing in *Haslip* suggests these two particular factors are essential to the constitutionality of a formula for reviewing punitive damage awards. But it is worthwhile to note both of them can be subsumed under the existing California formula and its overall goal of producing an award that is sufficient to punish and deter harmful conduct but not so severe it destroys the defendant. Evidence of prior punitive damage awards for the same conduct or the impact on "innocent third parties" both bear on that ultimate question and would be admissible under one or the other of three major categories.

What the United States Supreme Court concluded about the purpose and effect of appellate review of punitive damages awards in Alabama is equally true in California. Our high court has emphasized and reemphasized both trial and appellate courts should scrutinize these awards to ensure the amount is not beyond that required to punish and deter the offending conduct. The United States Supreme Court found appellate review in Alabama had "real effect" primarily because it could point to two cases in which the Alabama Supreme Court had reduced punitive damage awards. A survey of California appellate decisions reveals many reversals and reductions of punitive dam-

ages even in cases where the trial court had refused to interfere with the jury's verdict. (See appendix, *infra*, and *Devlin* v. *Kearny Mesa AMC/Jeep Renault, Inc.*, *supra*, 155 Cal.App.3d at pp. 393-396.)

Scientology complains about the standard of review this court and other California courts apply under California law—the traditional "passion and prejudice" standard. Scientology equates California's "passion and prejudice" standard with Vermont and Mississippi standards which the *Haslip* opinion noted had warranted expressions of "concern" from individual Justices in other opinions. (*Pacific Mutual Life Ins. Co.* v. *Haslip, supra*, 111 S.Ct. at p. 1045, fn. 10, citing *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.* (1989) 492 U.S. 257 and *Bankers Life & Casualty Co.* v. *Crenshaw* (1988) 486 U.S. 71.)

Setting aside the fact the *Haslip* court only mentioned the Vermont and Mississippi formulations had raised "concerns" and in no way held they violated due process, Scientology is mixing apples and oranges in comparing California's version of a "passion and prejudice" standard with what exists in these two jurisdictions. Vermont allows punitive damages to be modified or set aside only if "manifestly and grossly excessive" while Mississippi modifies or sets aside a punitive damages verdict only if the award "evinces passion, bias and prejudice on the part of the jury so as to shock the conscience."

It is true California uses the rubric of a "presumption the jury acted out of passion and prejudice" to justify setting aside or modifying jury awards of punitive damages. But in reality, as discussed earlier, that standard now stands for a set of specific criteria, detailed jury instructions, and procedures which define "passion and prejudice" in a way which is far more precise and far less subjective than the Vermont and Mississippi formulations.[9] Indeed as highlighted earlier, the California criteria

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[9] It is interesting but not essential to our decision in this case to note a federal appellate court has held the Mississippi standard of review is constitutional under *Haslip* despite the expressions of "concern" reflected in that opinion. *Eichenseer* v. *Reserve Life Ins. Co., supra*, 934 F. 1377 was one of the other cases the United States Supreme Court was holding at the time it decided *Haslip* and remanded for reconsideration in the light of *Haslip*. On remand the Fifth Circuit Court of Appeal evaluated the Mississippi procedures and the spe-

closely parallel—and in some respects are more precise and less subjective—than the Alabama criteria found constitutional in *Haslip*. We find nothing in *Haslip* suggesting California's version of a "presumption of passion and prejudice" standard of review is constitutional. (Accord: *Las Palmas Associates* v. *Las Palmas Center, supra*, 235 Cal.App.3d 1220.) Accordingly, we have no reservations about applying this standard to the punitive damage award the jury imposed in the instant case.

E. *The Preponderance of the Evidence Standard as Applied to Punitive Damages Issues.*

The United States Supreme Court expressly approved the use or a "preponderance of the evidence" standard in deciding punitive damages issues. (*Pacific Mutual Life Ins. Co.* v. *Haslip, supra*, 111 S.Ct. at p. 1046, fn. 11.) California law has been amended to require the higher standard of "clear and convincing" evidence. (Civ. Code.) However, at the time of the trial in the instant case the standard was still "preponderance of the evidence." Yet, as the nation's high court held, "the lesser standard prevailing in Alabama—'reasonably satisfied from the evidence'—when buttressed, as it is, by the procedural and substantive protections outlined above is constitutionally sufficient." (*Pacific Mutual Life Ins. Co.* v. *Haslip, supra*, 111 S.Ct. at p. 1040, fn. 11.) For reasons expressed above, California law supplies the same "buttress" of procedural and substantive protections, and did so at the time the instant case was tried. Accordingly, the use of a "preponderance of the evidence standard" in this case was constitutionally sufficient under *Haslip*.

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cific punitive damage award. The court upheld that award even though it was 500 times compensatory damages and even though Mississippi courts only reverse when an award evinces passion, bias, or prejudice sufficient to "shock the conscience." (*Id.*) "As long as here is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis. . . ." (*Id.* at p. 1385.)

III. *APPLYING CALIFORNIA'S STANDARDS TO THIS CASE WE CONCLUDE THE PUNITIVE DAMAGES AWARD WAS EXCESSIVE AND MUST BE REDUCED OR RETRIED.*

Having determined California punitive damages law is constitutional, we now apply that law to the punitive damages award in this case. We first review the guiding principles of California law on this subject, most of which have been mentioned in the course of the constitutional discussion.

A. *Applying the California Criteria.*

"It is well established that a reviewing court should examine punitive damages and, where appropriate, modify the amount in order to do justice." (*Gerard* v. *Ross* (1988) 204 Cal.App.3d 968, 980; *Allard* v. *Church of Scientology* (1976) 58 Cal.App.3d 439, 463.) In reviewing a punitive damages award, the appellate court applies a standard similar to that used in reviewing compensatory damages, i.e., whether, after reviewing the entire record in the light most favorable to the judgment, the award was the result of passion or prejudice. (*See Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 64; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at p. 388.) However, as discussed earlier the test here is more refined, employing three factors to evaluate the propriety of the award.

The first factor is the degree of reprehensibility of the defendant's conduct. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) "[C]learly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Ibid.*)

The second factor is the relationship between the amount of the award and the actual harm suffered. (*Ibid.*; *Seeley* v. *Seymour* (1987) 190 Cal.App.3d 844, 867.) This analysis ordinarily focuses upon the ratio of compensatory damages to punitive damages; the greater the disparity between the two awards, the more likely the punitive damages award is suspect. (*Seeley*

v. *Seymour, supra*, 190 Cal.App.3d at p. 867; see *Little* v. *Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469-470.)

Finally, a reviewing court will consider the relationship of the punitive damages to the defendant's financial condition. (*Adams* v. *Murakami, supra*, 54 Cal.3d 105; *Neal* v. *Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at p. 390.) In applying this factor courts must strike a proper balance between inadequate and excessive punitive damage awards. "While the function of punitive damages will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort, the function also will not be served by an award which is larger than necessary to properly punish and deter." (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at p. 391.)

In this case, we need not go beyond the third factor—the ratio between punitive damages and the defendant's financial condition. The evidence admitted at trial supported the finding the appellant church had a net worth of $16 million at the time of trial. Accepting these figures as true, the punitive damages award was *150 percent* of appellant's net worth. Under prevailing standards established in prior appellate cases, this ratio is clearly excessive. (*Seeley* v. *Seymour, supra*, 190 Cal.App.3d at p. 869 [punitive damages reversed; award was 200 percent of defendant's net worth]; *Burnett* v. *National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012 [punitive damages reduced; initial award was 35 percent of defendant's net worth]; *Egan* v. *Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 824 [punitive damages reversed; award was 58 percent of defendant's net income]; *Allard* v. *Church of Scientology, supra*, 58 Cal.App.3d at pp. 445-446, 453 [punitive damages reversed; award was 40 percent of defendant's net worth]; compare *Devlin* v. *Kearney AMC/Jeep/ Renault, Inc., supra*, 155 Cal. App.3d at pp. 391-392 [punitive damages affirmed where award was 17.5 percent of defendant's net worth]; *Schomer* v. *Smidt* (1980) 113 Cal.App.3d 828, 836-837 [punitive damages affirmed; award was 10 percent of defendant's net worth]; *Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100 [punitive damages affirmed;

award was 7.2 percent of defendant's net income].) Accordingly, we reverse the punitive damage award unless the plaintiff accepts a remittitur of that judgment to $2 million.[10]

B. *It is Both Proper and Constitutional to Reduce Rather Than Reverse the Punitive Damage Award in This Case.*

Scientology questions a court's authority to reduce a punitive damages award even under a remittitur where it has concluded the award was excessive under a "presumption of passion and prejudice" standard. According to Scientology, we should be required to reverse the entire punitive damages judgment unconditionally.

Scientology relies for this proposition on a single decision of the United State Supreme Court, *Minneapolis, etc. Ry.* v. *Moguin* (1931) 283 U.S. 520, 521. There are several grounds on which *Moguin*—and its holding that "no verdict can . . . stand which is found to be in any degree the result of appeals to passion and prejudice"—could be distinguished. However, that is not necessary since *Moguin* is in no sense binding on this or any other California court. *Moguin* was not announcing a rule of federal due process to guide litigation in state courts. Rather this case arose in a federal action tried in state court. It sets forth a rule of federal law and is limited in its application to federal cases. Indeed the United States Supreme Court was careful to highlight the rule it was announcing had nothing to do with the rules Minnesota courts apply in state litigation. Accordingly, there is no merit to Scientology's claim *Moguin*

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[10] In his brief on this reconsideration of the original judgment, Wollersheim claims Scientology's true net worth was several times greater than $16 million. The brief argues principally from purported revelations in other litigation rather than the record in this case. In essence, respondent's counsel claims Scientology spun off the majority of its assets to related corporations in contemplation of litigation and to put most of those assets beyond the reach of Wollersheim and other litigants. The record in this case is insufficient to support any such finding. Accordingly, for purposes of this appeal we are bound by the $16 million net worth figure in evaluating the punitive damage award. Wollersheim is not required to accept the remittitur if he is willing to retry the punitive damages phase of this case. In that retrial, he would not be bound by the record in the first trial on the question of Scientology's present net worth.

supersedes the many California Supreme Court and Court of Appeal cases which have reduced punitive damage awards rather than setting them aside after finding those awards were excessive and thus "presumed to be the product of passion and prejudice." (See, e.g., (*Neal* v. *Farmers Ins. Exchange, supra*, 21 Cal.3d 910; (*Gerard* v. *Ross, supra*, 204 Cal.App.3d 968, 980; *Allard* v. *Church of Scientology, supra*, 58 Cal.App.3d at p. 453.) See also other appellate cases in which punitive awards were reduced rather than set aside in the appendix to this case and the earlier chart in *Devlin* v. *Kearney AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d 381.)

C. *Scientology Is Not Exempt From Punitive Damages for Acts, Such as Those Involved in This Case, Which Are Not Constitutionally Protected Religious Practices.*

In a final challenge, Scientology claims the First Amendment bars the imposition of punitive damages on religious organizations for their "religious expressions" or, at a minimum, the First Amendment in combination with the due process clause requires closer scrutiny of any punitive damage award than would be true for other persons or entities. To support these arguments, Scientology cites cases actually involving freedom of speech or press not freedom of religion but which it claims "express reservations" about the use of punitive damages which might inhibit First Amendment activity (*i.e.*, (*Gertz* v. *Robert Welch* (1974) 418 U.S. 323; *Electrical Workers* v. *Foust* (1979) 442 U.S. 42.) Notably, several opinions, including one cited by Scientology, uphold punitive damage awards in private defamation actions. (*Gertz* v. *Robert Welch, supra*, 418 U.S. 323; *Dun & Bradstreet* v. *Greenmoss Builders, Inc.* (1985) 472 U.S. 749; *Curtiss Publishing Co.* v. *Butts* (1967) 388 U.S. 130.)

The first of Scientology's arguments ignores the fact this court found the patterns of activities which justified punitive damages in this case were either found not to qualify as "religious expression" at all (i.e., "fair game") (*Wollersheim* v. *Church of Scientology, supra*, 212 Cal.App.3d at pp. 891-899) or were found not be constitutionally protected because forced

on participants like Wollersheim through emotional, economic and physical coercion (i.e., "auditing," "disconnect.") (*Id.* at pp. 891-899.) Thus, the imposition of punitive damages for this conduct does not impinge on constitutionally protected religious expression. It only punishes and deters reprehensible activities which visit serious harm on others in society. Under California law, punitive damages could be imposed on other individuals and entities which engaged in this conduct. Therefore, such damages can be imposed on those who claim to have done these constitutionally unprotected actions out of religious motivation. (*Employment Div. Dept. of Human Res. of Oregon* v. *Smith, supra,* 494 U.S. 872.)

The "heightened scrutiny" argument merely resurrects the contention and many of the authorities Scientology marshalled in support of its earlier position the court must closely scrutinize liability claims based on actions which may constitute "religious expression." Once again, the cases cited involve freedom of speech not free exercise of religion (i.e., *Young* v. *American Mini Theatres* (1976) 427 U.S. 50; *New York Times Co.* v. *United States* (1971) 403 U.S. 713; *Speiser* v. *Randall* (1958) 357 U.S. 513.) Moreover, these cases focus on the process the court uses in determining whether the speech involved qualifies for constitutional protection at all, not whether it warrants a punitive damage award.

Nonetheless, setting these problems aside, the fundamental problem with Scientology's argument is that we already have applied this "heightened scrutiny" to the activities for which Scientology claims constitutional protection. We found those activities did not qualify as "voluntary religious expression" or in some instances did not qualify as "religious expression" at all. (See *Wollersheim* v. *Church of Scientology, supra,* 212 Cal.App.3d at pp. 891-899.) We already subjected these activities to "heightened scrutiny" and found them to lack constitutional protection under the free exercise of religion clause. Consequently, there is no reason to subject them to another round of "heightened scrutiny" in order to determine whether they are immune from punitive damages. The reason for "heightened scrutiny" of the punitive damage award evaporated

with the finding the acts themselves were not constitutionally protected.

Alternatively, even if we follow Scientology's request and subject the punitive damage award in this case to "heightened scrutiny" we arrive at the same conclusion as when we subjected the acts themselves to "heightened scrutiny." There is a compelling state interest in punishing and deterring this constitutionally unprotected, harmful conduct just as there is a compelling state interest in compensating the victims.

DISPOSITION

The judgment is reversed as to the cause of action for negligent infliction of emotional injury. the judgment as to the cause of action for intentional infliction of emotional injury is affirmed with the exception the compensatory damage award and the punitive damage award are set aside, unless the plaintiff agrees to a remittitur reducing the compensatory damages to $500,000 and the punitive damages to $2 million. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

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JOHNSON, J.

We concur:

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LILLIE, P.J.

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WOODS (FRED), J.

Appendix to March 20, 1992 Opinion of the California Court of Appeal

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Nelson v. *Gaunt* (1981) 125 Cal.App.3d 623	$450,000	$1.5 mil	No wealth data		No wealth data	Affirmed	No wealth data	3.3 to 1
Chodos v. *Insurance Co. of N. America* (1981) 126 Cal.App.3d 86	$5,146.71	$200,000	.08% net profit .01% net worth	Denied	.08% net profit .01% net worth	Affirmed	.08% net profit .01% net worth	40 to 1
Betts v. *Allstate Ins. Co.* (1984) 154 Cal.App.3d 684	$500,000 against D1 $500,000 against D1 & D2	$3 Mil. against D1	Less than one-half week's earnings	Granted (Unless joint & several compensatory remitted to $50,000.)	Less than one-half week's earnings	Affirmed	Less than one-half week's earnings	5.5 to 1
Goshgarian v. *George* (1984) 161 Cal.App.3d 1214	$714.29	$15,000	10.7% net worth		10.7% net worth	Affirmed Compensatory damages. Punitives reversed. (Unless remitted to $7,500.)	5.4% net worth	10.5 to 1
Hobbs v. *Bateman Eichler, Hill, Richards, Inc.* (1985) 164 Cal.App.3d 174	$96,000 against D1 & D2	$220,000 against D1	1% net worth	Denied	1% net worth	Affirmed	1% net worth	2.3 to 1

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Sprague v. *Equifax, Inc.* (1985) 166 Cal.App.3d 1012	$100,000	$5 Mil.	No wealth data	Denied (Conditional upon reduction in punitives to $1 Mil.)	No wealth data	Affirmed	No wealth data	10 to 1 (If remittitur accepted.)
Greenfield v. *Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111	$350,000 against D1 and D2	$400,000 against D1 $42,500 against D2	D2 earned $2,000/mo. and owned automobile	Granted (Unless compensatory reduced to $150,000; punitives against D1 reduced to $200,000; punitives against D2 reduced to $15,000.)	D2 earned $2,000/mo. and owned automobile	Reinstated original judgments	D2 earned $2,000/mo. and owned automobile	D1: 1.1 to 1 D2: .12 to 1
West v. *Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831	$500,000	$10 Mil.	.44% net worth	Granted (Unless compensatory damages remitted to $100,000 and punitives to $1 Mil.)	.04% net worth	Affirmed	.04% net worth	10 to 1
Campbell v. *McClure* (1986) 182 Cal.App.3d 806	$181,291.13	$99,393.19 (To be reduced to $1,000 if paid by deadline.)	No wealth data	None	No wealth data	Affirmed	No wealth data	.55 to 1 (If deadline met, .01 to 1.)

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Greenup v. *Rodman* (1986) 42 Cal.3d 822	$338,000	$338,000	No wealth data	None	No wealth data	Ct. of Appeal affd. Supreme Ct. revd. and reduced compensatory damages to $15,000 and punitives to $100,000. (Unless D files amended complaint.)	No wealth data	6.7 to 1
Barragan v. *Banco BCH* (1986) 188 Cal.App.3d 283	$1 Mil.	$2 Mil.	No wealth data	None	No wealth data	Modified compensatory damages to $500,000; reversed punitives and remanded to determine defendant's net worth	—	—
Downey S&L Assn. v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072	$152,983.43	$5 Mil.	1.9% net worth; 1% net worth of parent co.; 16.7% net annual income; 3.64% net annual income of parent co.; 7.14% average net annual income	Denied	(Same as column 3)	Affirmed	(Same as column 3)	33 to 1
DeTomaso v. *Pan. Am. World Airways, Inc.* (1987) 43 Cal.3d 517	$265,000	$300,000	No wealth data	Granted (Unless remittitur of $358,393 accepted.)	No wealth data	Ct. of Appeal affd. and reinstated original judgment. Supreme Ct. reversed. (Tort action preempted by Federal Railway Labor Act; breach of warranty; cause of action remanded for new trial.)	No wealth data	—

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Seeley v. *Seymour* (1987) 190 Cal.3d 844	$200,000 joint and several among 5 defendants	$2.66 Mil. against D1	200% net worth	Denied	200% net worth	Reversed compensatory and punitive damages as excessive	—	—
Palmer v. *Ted Stevens Honda* (1987) 193 Cal.App.3d 530	$29,500	$150,000	No wealth data	Denied	No wealth data	Punitive damages reversed because evidence of actual damages improperly excluded	No wealth data	—
Castaic Clay Manuf. Co. v. *Gus Dedes* (1987) 195 Cal.App.3d 444	$529,000	$200,000	No wealth data		No wealth data	Affirmed	No wealth data	.38 to 1
Dumas v. *Stocker* (1989) 213 Cal.App.3d 1262	$47,000	$141,000	No wealth data	Denied	No wealth data	Reversed punitives and remanded for redetermination based on defendant's net wealth	No wealth data	—
Storage Services v. *Osterbaan* (1989) 214 Cal.App.3d 498	$1 Mil. 044,250 against D1 and D2	$75,000 against D1 $150,000 against D2	50%–37.5% net worth of D1; 144%–129% gross income of D1; No wealth data on D2		50%–37.5% net worth of D1; 144%–129% gross income of D1; No wealth data on D2	Reversed punitives against D1 as excessive. (If plaintiff consents to remittitur modified to $20,000); reverses punitives against D2 in absence of data on net wealth.	—	—

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Fenlon v. *Brock* (1989) 216 Cal.App.3d 1174	$95,000	$40,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	.42 to 1
Armitage v. *Becker* (1990) 218 Cal.App.3d 887	$25,000	$1,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data (Court infers from record that $1,000 not excessive.)	.04 to 1
Gerard v. *Ross* (1988) 204 Cal.App.3d 968	$8,200 against D1 and D2	$50,000 against D1; $100,000 against D2	70% gross income of D1; 11% net worth of D1; 100% net worth of D2; 111% to 67% annual net income of D2	Granted unless punitives against D1 remitted to $25,000	5.6% net worth of D1, 35% gross income of D1, 100% net worth of D2, 111%–67% annual net income of D2	Reduced punitives against D2 to $1,000	5.6% net worth of D1, 35% gross income of D1, 1% net worth of D2, 1.11% –.67% annual net income of D2	D1: 3.1 to 1 D2: .12 to 1
Gagnon v. *Continental Casualty Co.* (1989) 211 Cal.App.3d 1598	$70,000	$2.5 Mil.	No wealth data		No wealth data	Compensatory and punitive damages reversed (Plaintiff not entitled to compensatory damages and prejudicial error made in jury instructions.)	—	Plaintiff not entitled to compensatory damages
Wollersheim v. *Church of Scientology of California* (1989) 212 Cal.App.3d 872	$5 Mil.	$25 Mil.	156% net worth	Denied	156% net worth	Modified punitives to $2 Mil. and compensatory damages to $500,000	13% net worth	4 to 1

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Roberts v. *Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793	$292,224.09	$750,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	2.6 to 1
Pat Rose Assoc. v. *D. Wesley Coombe* (1990) 225 Cal.App.3d 9	About $5.2 Mil.	$3 Mil.	No wealth data		No wealth data	Affirmed modified judgment allowing for offset against compensatory damages	No wealth data	.58 to 1
Liberty Transport, Inc. v. *Harry W. Gorst Company, Inc.* (1991) 229 Cal.App.3d 417	$82,500 against D1 and D2	D1: $40,000 D2: $400,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	D1: .48 to 1 D2: 4.8 to 1
Adams v. *Murakami* (1991) 54 Cal.3d 105	$274,266 (after adjustment by trial court.)	$750,000 (after adjustment by trial court.)	No wealth data	None	No wealth data	Ct. of Appeal affd. Supreme Ct. reversed punitives because of lack of evidence of defendant's wealth	No wealth data	—

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (Re: Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Las Palmas Assoc. v. *Las Palmas Center Assoc.* (1991) 235 Cal.App.3d 1220	$1 Mil. 502,393	$10 Mil.	2% net value	Denied	2% net value	Reduced punitives to $2 Mil. Reduced compensatory to $464,786	.4%	4.3 to 1
Douglas v. *Ostermeier* (1991) 1 Cal.App.4th 729	$10,624	$187,000	Per defendant, nearly 50% value of his business property. Per plaintiff, "small fraction" of defendant's net worth	Denied	Per defendant, nearly 50% value of his business property. Per plaintiff, "small fraction" of defendant's net worth	Affirmed	Per defendant, nearly 50% value of his business property. Per plaintiff, "small fraction" of defendant's net worth	18 to 1
Washington v. *Farlice* (1991) 1 Cal.App.4th 766	$10,000	$50,000	More than 30% admitted worth	Denied	More than 30% admitted worth	Affirmed compensatory damages. Reversed punitives. (Remanded for redetermination on evidence of defendant's financial condition.)	—	—

APPENDIX D

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT—DIVISION SEVEN

B023193

(LASC No. C332827)

Filed April 20, 1992

LARRY WOLLERSHEIM,

Plaintiff and Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Defendant and Appellant.

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on March 20, 1992, be modified in the following particulars:

1. On page 31, line 9, delete footnote number 10. At the bottom of that page delete footnote 10.

2. On page 36, lines 5 through 7 of the text, replace the remainder of the sentence after the words "damage award" with the following:

> are modified to reduce the compensatory damages to $500,000 and the punitive damages to $2 million.

This modification of the opinion represents a change in judgment.

Appellant's petition for rehearing is denied.

CERTIFIED FOR PUBLICATION

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SO11790

LARRY WOLLERSHEIM,

Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Appellant.

ORDER DENYING REVIEW

Order Filed October 26, 1989

AFTER JUDGMENT BY THE COURT OF APPEALS
Second Appellate District, Division Seven,
No. B023193

Appellant's and respondent's petitions for review DENIED.

APPENDIX F

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B023193

Filed: August 17, 1989

(LASC No. C332827)

LARRY WOLLERSHEIM,
Plaintiff and Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Defendant and Appellant.

ORDER MODIFYING OPINION AND
DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on July 18, 1989, be modified in the following particulars:

On page 2, line 4 of the first paragraph change the word "appellants" to "appellant." Thereafter, change the plural form "appellants" and "appellants' " to the singular form "appellant" and "appellant's" throughout the remainder of the opinion.

On page 2, line 9 of the first paragraph, change "they were" to "it was."

On page 7, line 1 of the second paragraph change "raise" to "raises".

On page 34, line 4 of the second paragraph change "church" to "Church."

On page 47, line 6 from the bottom of the page change "they were" to "it was." On line 2 from the bottom of the same page change "were able" to "was able".

On page 48, line 1 change "complain" to "complains" and in line 2, change "they" to "it".

On page 48, line 3 of the second paragraph change "they" to "appellant".

On page 49, line 10 change "complain" to "complains" and in line 11 change "their" to "its".

On page 50, line 10 change "complain" to "complains"; in line 11 change "they mention" to "it mentions"; in line 12 change "they accuse" to "it accuses"; in line 14 change "their brief appellants concede" to "its brief appellant concedes" and in line 16 change "they ask" to "it asks."

On page 51, line 7 change "object" to "objects."

In the second paragraph on the same page, line 1 change the word "complain" to "complains"; in line 3 change "their" to "its"; in line 4 change "provide" to "provides"; in line 6 change "They confine themselves" to "It confines itself"; in line 8 change "they expect" to "it expects" and in line 9 change "their" to "its."

On page 52, the first paragraph, line 1 change "their" to "its"; in line 2 change "set" to "sets", "their" to "its" and "they" to "it"; in line 3 change "allege" to "alleges" and line 11, change "their" to "its".

On page 56, line 7 replace the sentence commencing "This appears . . . ." with the following sentence:

> This ratio is well outside the permissible range established in other appellate cases.

On the same page, the last two lines on the page, replace the sentence commencing "We find it . . . ." with the following two sentences:

> Respondent asserts appellant's true net worth approaches $250 million not $16 million and thus the punitive damage award is not excessive. However,

respondent failed to prove the higher net worth figure at trial.

Appellant's petition for rehearing is denied. Respondent's petition for rehearing is denied.

No change in judgment.

CERTIFIED FOR PUBLICATION

APPENDIX G

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B023193

Filed: July 18, 1989

(LASC No. C332827)

LARRY WOLLERSHEIM,
Plaintiff and Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Swearinger, Judge. Modified, affirmed in part and reversed in part.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman and Eric M. Lieberman and Terry Gross, Lenske, Lenske & Heller and Lawrence E. Heller, and Michael Lee Hertzberg for Defendant and Appellant.

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg and Charles B. O'Reilly for Plaintiff and Respondent.

Boothby, Ziprick & Yingst and William F. Ziprick, Lee Boothby and James M. Parker as Amicus Curiae on behalf of Defendant and Appellant.

This appeal arises after a jury awarded $30 million in compensatory and punitive damages to a former member of the Church of Scientology (the Church). The complaint alleged appellants intentionally and negligently inflicted severe emotional injury on respondent through certain practices, including "auditing," "disconnect," and "fair game." Since the trial court granted summary adjudication that Scientology is a religion and "auditing" is a religious practice, the trial proceeded under the assumption they were. We conclude there was substantial evidence to support a factual finding the "auditing," as well as other practices in this case, were conducted in a coercive environment. Thus, none of them qualified as "*voluntary* religious practices" entitled to constitutional protection under the First Amendment religious freedom guarantees. At the same time, we conclude both the compensatory and punitive damages the jury awarded in this case are excessive. Consequently, we modify the judgment to reduce both of these damage awards.

FACTS AND PROCEEDINGS BELOW

Construing the facts most favorably to the judgment, as we must, respondent Larry Wollersheim was an incipient manic-depressive for most of his life. Appellants Scientology and its leaders were aware of Wollersheim's susceptibility to this mental disorder: What appellants did to him during and after his years in Scientology aggravated Wollersheim's mental condition, driving him into deep depressive episodes and causing him severe mental anguish. Furthermore, Scientology engaged in a practice of retribution and threatened retribution—often called "fair game"—against members who left or otherwise posed a threat to the organization. This practice coerced Wollersheim into continued participation in the other practices of Scientology which were harming him emotionally.

Wollersheim first became acquainted with Scientology in early 1969 when he attended a lecture at the "Church of Scientology of San Francisco." During the next few months

he completed some basic courses at the San Francisco institution. He then returned to his home state of Wisconsin and did not resume his scientology training for almost two years.

When Wollersheim did start again it was at the appellant, Church of Scientology of California, headquartered in Los Angeles. From 1972 through 1979 Wollersheim underwent "auditing" at both the basic and advanced levels. In 1973 he worked several months as a staff member at the Church of Scientology Celebrity Center located in Los Angeles. In 1974, despite his repeated objections, Wollersheim was persuaded to participate in auditing aboard a ship maintained by Scientology. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. Further, Wollersheim and others were forced to sleep nine deep in the ship's hold. During his six weeks under these conditions, Wollersheim lost 15 pounds.

Wollersheim attempted to escape from the ship because he felt he "was dying and losing [his] mind." His escape was thwarted by Scientology members who seized Wollersheim and held him captive until he agreed to remain and continue with the auditing and other religious practices taking place on the vessel. One of the psychiatric witnesses testified Wollersheim's experience on the ship was one of five cataclysmic events underlying the diagnosis of his mental illness and its cause.

At another stage Scientology auditors convinced him to "disconnect" from his wife and his parents and other family members because they had expressed concerns about Scientology and Wollersheim's continued membership. "Disconnect" meant he was no longer to have any contact with his family.

There also was evidence of a practice called "freeloader debt." "Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally

charged to the member. Appellants maintained a "freeloader debt" account for Wollersheim.

During his years with Scientology Wollersheim also started and operated several businesses. The most successful was the last, a service which took and printed photographic portraits. Most of the employees and many of the customers of this business were Scientologists.

By 1979, Wollersheim's mental condition worsened to the point he actively contemplated suicide. Wollersheim began experiencing personality changes and pain. When the Church learned of Wollersheim's condition, Wollersheim was sent to the Flag Land Base for "repair."

During auditing at Flag Land Base, Wollersheim's mental state deteriorated further. He fled the base and wandered the streets. A guardian later arranged to meet Wollersheim. At that meeting, the guardian told Wollersheim he was prohibited from ever speaking of his problems with a priest, a doctor or a psychiatrist.

Ultimately Wollersheim became so convinced auditing was causing him psychiatric problems he was willing to risk becoming a target of "freeloader debt" and "fair game." Evidence was introduced that, at least during the time relevant to Wollersheim's case, "fair game" was a practice of retribution Scientology threatened to inflict on "suppressives," which included people who left the organization or anyone who could pose a threat to the organization. Once someone was identified as a "suppressive," all scientologists were authorized to do anything to "neutralize" that individual—economically, politically, and psychologically.

After Wollersheim left the organization Scientology leaders initiated a "fair game" campaign which among other things was calculated to destroy Wollersheim's photography enterprise. They instructed some Scientology members to leave Wollersheim's employ, told others not to place any new orders with him and to renege on bills they owed on previous purchases from the business. This strategy shortly drove Wollersheim's photography business into bankruptcy. His mental condition deteriorated further and he ended up under psychiatric care.

Wollersheim thereafter filed this lawsuit alleging fraud, intentional infliction of emotional injury, and negligent infliction of emotional injury. At the law-and-motion stage, a trial court granted summary adjudication on two vital questions. It ruled Scientology is a religion and "auditing" is a religious practice of that religion.

During trial, Wollersheim's experts testified Scientology's "auditing" and "disconnect" practices constituted "brain-washing" and "thought reform" akin to what the Chinese and North Koreans practiced on American prisoners of war. They also testified this "brain-washing" aggravated Wollersheim's bipolar manic depressive personality and caused his mental illness. Other testimony established Scientology is a hierarchical organization which exhibits near paranoid attitudes toward certain institutions and individuals—in particular, the government, mental health professions, disaffected members and others who criticize the organization or its leadership. Evidence also was introduced detailing Scientology's retribution policy, sometimes called "fair game."

After the evidence was heard, the trial judge dismissed the fraud count but allowed both the intentional and negligent infliction of emotional injury counts to go to the jury. The jury, in turn, returned a general verdict in favor of plaintiff on both counts. It awarded $5 million in compensatory damages and $25 million in punitive damages. The motion for new trial was denied and appellants filed a timely appeal.

DISCUSSION

Appellants raise a broad spectrum of issues all the way from a technical statute of limitations defense to a fundamental constitutional challenge to this entire species of claims against Scientology. If the narrower grounds of appeal had merit and disposed of the case we could avoid confronting the difficult constitutional questions. But since they do not we must consider Scientology's religious freedom claims.

I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT WOLLERSHEIM'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The cause of action for intentional infliction of emotional injury formed the centerpiece of the case which went to the jury. This claim actually cumulates four courses of conduct which together allegedly inflicted severe emotional damage on the psychologically weak Wollersheim. These courses of conduct are: (1) subjecting Wollersheim to forms of "auditing" which aggravated his predisposition to bipolar mania-depression; (2) psychologically coercing him to "disconnect" from his family; (3) "disclosing personal information" Wollersheim revealed during auditing under a mantle of confidentiality; and, (4) conducting a retributive campaign ("fair game") against Wollersheim and particularly against his business enterprise.

The tort of intentional infliction of emotional distress was created to punish conduct " 'exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress.' " (*Agarwal* v. *Johnson* (1979) 25 Cal.3d 932, 946.) A prima facie case requires: (1) outrageous conduct by the defendant; (2) an intention by the defendant to cause, or the reckless disregard of the probability of causing, emotional distress; (3) severe emotional distress; and (4) an actual and proximate causation of the emotional distress. (*Nally* v. *Grace Community Church* (1988) 47 Cal.3d 278, 300.)

"Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Agarwal* v. *Johnson*, *supra*, 25 Cal.3d at p. 946.)

There is substantial evidence to support the jury's finding on this theory. First, the Church's conduct was manifestly outrageous. Using its position as his religious leader, the Church and its agents coerced Wollersheim into continuing

"auditing" although his sanity was repeatedly threatened by this practice. (See pp. 29-33, *infra.*) Wollersheim was compelled to abandon his wife and his family through the policy of disconnect. When his mental illness reached such a level he actively planned his suicide, he was forbidden to seek professional help. Finally, when Wollersheim was able to leave the Church, it subjected him to financial ruin through its policy of "fair game".

Any one of these acts exceeds the "bounds usually tolerated by a decent society," so as to constitute outrageous conduct. In aggregate, there can be no question this conduct warrants liability *unless it is privileged as constitutionally protected religious activity.* (See pp. 11-17, *infra.*)

Second, the Church's actions, if not wholly calculated to cause emotional distress, unquestionably constituted reckless disregard for the likelihood of causing emotional distress. The policy of fair game, by its nature, was intended to punish the person who dared to leave the Church. Here, the Church actively encouraged its members to destroy Wollersheim's business.

Further, by physically restraining Wollersheim from leaving the Church's ship, and subjecting him to further auditing despite his protests, the Church ignored Wollersheim's emotional state and callously compelled him to continue in a practice known to cause him emotional distress.

Third, Wollersheim suffered severe emotional distress. Indeed, his distress was such that he actively considered suicide and suffered such psychiatric injury as to require prolonged professional therapy. (See *Fletcher* v. *Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397 [severe emotional distress "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry"].)

Finally, there is substantial evidence the Church's conduct proximately caused the severe emotional distress. Wollersheim's bankruptcy and resulting mental distress was the direct result of the Church's declaration that he was fair game. Additionally, according to the psychiatric testimony

auditing and disconnect substantially aggravated his mental illness and triggered several severe depressive episodes.

In sum, there is ample evidence to support the jury's verdict on Wollersheim's claim for intentional infliction of emotional distress. This, however, does not conclude our inquiry. As we discuss below, Wollersheim's action may nonetheless be barred if we conclude the Church's conduct was protected under the free exercise clause of the First Amendment.

II. CONSTITUTIONAL RELIGIOUS FREEDOM GUARANTEES DO NOT IMMUNIZE SCIENTOLOGY FROM LIABILITY FOR ANY OF THE ACTIONS ON WHICH WOLLERSHEIM'S INTENTIONAL INFLICTION OF EMOTIONAL INJURY CAUSE OF ACTION IS BASED

Scientology asserts all four courses of conduct comprising the intentional infliction claim are forms of religious expression protected by the Freedom of Religion clauses of the United States and California Constitutions. We conclude some would not be protected religious activity even if Wollersheim freely participated. We further conclude none of these courses of conduct qualified as protected religious activity in Wollersheim's case. Here they occurred in a coercive atmosphere appellants created through threats of retribution against those who would leave the organization. To explain our conclusions it is necessary to examine the parameters and rationale of the religious freedom provisions in some depth.

A. *The Basic Principles of the "Free Exercise" Clause*

Religious freedom is guaranteed American citizens in just 16 words in the First Amendment. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof; . . ." (U.S. Const., Amend. I, italics added.[1].)

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1 All discussion in this opinion as to the freedom of religion provisions of the U.S. Constitution applies also to appellants' claims under article I, section 4 of the California Constitution which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."

When it was adopted, the First Amendment only applied to the federal government, not the states. (U.S. Const., 1st Amend. ["*Congress* shall make no law . . ."], emphasis added; see *Permoli v. First Municipality* (1845) 44 U.S. 589, 609.) However, following ratification of the Fourteenth Amendment, the First Amendment protections became enforceable against the states via the Fourteenth Amendment's due process clause. (*California v. Grace Brethren Church* (1982) 457 U.S. 393, 396 fn. 1; *Everson v. Board of Education* (1947) 330 U.S. 1, 8.)

"[T]he application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred." (*Paul v. Watchtower Bible & Tract Soc. of New York* (9th Cir. 1987) 819 F.2d 875, 880; accord *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1114 ["judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions"]; see *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277.)

As can be seen, the First Amendment creates two very different protections. The "establishment clause"—actually an "*anti*-establishment clause"—guarantees us the government will not use its resources to impose religion on us. The "free exercise clause," on the other hand, guarantees us government will not prevent its citizens from pursuing any religion we choose.

The "establishment clause" comes into play when a government policy has the effect of promoting religion—as by financing religious schools or requiring religious prayers in public schools, and the like. These policies violate the establishment clause unless they survive a three-part test. They must have a secular purpose. Their primary effects must be ones which neither advance nor inhibit religion. And they must avoid any excessive entanglements with religion. (*Lemon* v. *Kurtzman* (1971) 403 U.S. 602, 612-613; see also *Committee for Public Education v. Nyquist* (1973) 413 U.S.

756, 773; *Abington School Dist. v. Schempp* (1963) 374 U.S. 203, 222.) The "free exercise clause," in contrast to the "establishment clause," was adopted without debate or comment when the First Congress deliberated the Bill of Rights. (Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1976).) Thus the courts have turned to other writings by those responsible for the Bill of Rights, especially James Madison and Thomas Jefferson, to divine the meaning of "free exercise of religion."

The subsequent cases interpreting these four words make it clear that while the free exercise clause provides absolute protection for a person's religious *beliefs*, it provides only limited protection for the *expression* of those beliefs and especially *actions* based on those beliefs. (*Cantwell* v. *Connecticut* (1940) 310 U.S. 296, 303-304.) Freedom of belief is absolutely guaranteed, freedom of action is not. Thus government cannot constitutionally burden any belief no matter how outlandish or dangerous. But in certain circumstances it can burden an expression of belief which adversely affects significant societal interests. To do so, the burden on belief must satisfy a four-part test: First, the government must be seeking to further an important—and some opinions suggest a compelling—state interest. Secondly, the burden on expression must be essential to further this state interest. Thirdly, the type and level of burden imposed must be the minimum required to achieve the state interest. Finally, the measure imposing the burden must apply to everyone, not merely to those who have a religious belief; that is, it may not discriminate against religion.

A straightforward exposition of three prongs of this test is found in *United States* v. *Lee* (1981) 455 U.S. 252, 257-258 where the Supreme Court held: "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. (Citations omitted.)" All four are mentioned in *Braunfeld* v. *Brown* (1961) 366 U.S. 599, 607: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid . . . . But if the State regulates conduct by

enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." (See also *Thomas* v. *Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 717-718; *Wisconsin* v. *Yoder* (1972) 406 U.S. 205, 220; *Gillette* v. *United States* (1971) 401 U.S. 437, 462; *Sherbert* v. *Verner* (1963) 374 U.S. 398, 402-403; *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at pp. 304-305.)

A review of the Supreme Court's "free exercise" rulings also makes it apparent the four critical factors are interrelated. Roughly speaking, the heavier the burden the government imposes on the expression of belief and the more significant the particular form of expression which is burdened, the more important the state interest must be. Or to put it the other way around, the more important the interest the state seeks to further, the heavier the burden it can constitutionally impose on the more important forms of expressing religious belief. Thus, only the most compelling of state interest—such as the preservation of life or of the state itself—will justify an outright ban on an important method of expressing a religious belief. (See, e.g., *Reynolds* v. *United States* (1878) 98 U.S. 145, 164 [polygamy can be outlawed even though a central religious tenet of the Mormon religion because it "has always been odious among the northern and western nations of Europe, . . . and from the earliest history of England has been treated as an *offence against society*." [Italics added.]; *Prince* v. *Massachusetts* (1943) 321 U.S. 158, 170 [parents can be prohibited from allowing their children to distribute religious literature even though this is a religious duty required in order to avoid "everlasting destruction at Armageddon" where necessary to protect the health and safety of youth]; *Jacobson* v. *Massachusetts* (1904) 197 U.S. 11, 26 [adults and children can be compelled to be vaccinated for communicable diseases even though their religious beliefs oppose vaccination because as was observed in *Prince* v. *Massachusetts*, *supra*, 321 U.S. at pp. 166-167, "[T]he right to practice religion freely does not include liberty to expose

the community or the child to communicable disease or the latter to ill health or death"].)

But a less significant state interest may be enough where the burden is less direct or the form of expression less central to the exercise of the particular religion. (See, e.g., *Goldman* v. *Weinberger* (1986) 475 U.S. 503, 509-510 where the military's apparently rather marginal interest in absolutely uniform attire was enough to justify an outright ban against a Jewish officer's apparently rather marginal form of religious expression in wearing a yarmulke [a religious cap] indoors.) In *Bowen* v. *Roy* (1986) 476 U.S. 693, disapproved on other grounds in *Hobbie* v. *Unemployment Appeals Commission* (1987) 480 U.S. 136, 141, the U.S. Supreme Court found the Federal government's interest in administrative convenience in preventing fraud in a benefit program was enough to justify the minimal burden of denying benefits to those who because of religious beliefs refuse to obtain and reveal social security numbers. *Braunfeld* v. *Brown*, *supra*, 366 U.S. 599, 605 [governmental interest in prohibiting economic activity on Sundays is enough to justify imposing the burden of an economic loss on those orthodox Jews who choose to exercise their religious belief that they not work on Saturdays and thus lose two rather than only one day's opportunity to earn money. "[T]he case before us . . . does not make *unlawful* any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs *more expensive*"], italics added.)

We now apply the above principles to the four courses of conduct alleged in Wollersheim's intentional infliction of emotional injury cause of action. To be entitled to constitutional protections under the Freedom of Religion clauses any course of conduct must satisfy three requirements. First, the system of thought to which the course of conduct relates must qualify as a "religion" not a philosophy or science or personal preference. Thus, it is unlikely a psychiatrist could successfully shield himself from malpractice by asserting he was merely practicing the "religion" of psychotherapy and following the "religious" teachings of Freud and Jung. Sec-

ondly, the course of conduct must qualify as an expression of that religion and not just an activity that religious people happen to be doing. Thus, driving a Sunday School bus does not constitute a religious practice merely because the bus is owned by a religion, the driver is an ordained minister of the religion, and the bus is taking church members to a religious ceremony. (See *Malley* v. *Fong* (1951) 37 Cal.2d 356, 373 [religious organization held liable for employee's negligent driving]; *Meyers* v. *S.W. Reg. Con. Ass'n. of Seventh Day Adv.* (La. 1956) 88 So.2d 381, 386 [First Amendment does not bar minister's workers' compensation action against church for injuries arising from auto accident which occurred when minister was traveling to church conference].) And, thirdly, the religious expression must not inflict so much harm that there is a compelling state interest in discouraging the practice which outweighs the values served by freedom of religion. Thus, the fact polygamy was a central practice of the Mormon religion was not enough to qualify it for constitutional protection from state governments which desired to ban this practice.

This means we must first ask three questions as to each of the four courses of conduct Wollersheim alleged against Scientology. (1) Does Scientology qualify as a religion? (2) If so, is the course of conduct at issue an expression of the religion of Scientology? (3) If it is, does the public nevertheless have a compelling secular interest in discouraging this course of conduct even though it qualifies as a religious expression of the Scientology religion? After answering these three questions, however, the special circumstances of this case require us to ask a fourth. Did Wollersheim participate in this course of conduct voluntarily or did Scientology coerce his continued participation through the threat of serious sanctions if he left the religion?

The threshold question for all four courses of conduct is whether Scientology qualifies as a religion. As will be recalled, at the law-and-motion stage, a judge granted summary adjudication on this issue. That court ruled Scientology indeed was a religion. And at the trial stage, another judge

reinforced this ruling by submitting the case to the jury with an instruction that Scientology is a religion.

As a result of the law-and-motion judge's decision on this question, evidence was not introduced at trial on the specific issue of whether Scientology is a religion. Given that vacuum of information, it would be presumptuous of this court to attempt a definitive decision on this vital question. We note other appellate courts have observed this remains a very live and interesting question. (See *Founding Church of Scientology* v. *United States* (D.C.Cir. 1969) 409 F.2d 1146, 1160-1161; *Founding Church of Scientology* v. *Webster* (D.C.Cir. 1986) 802 F.2d 1448, 1451 ["whether Scientology is a religious organization, a for-profit private enterprise, or something far more extraordinary [is] an intriguing question that this suit does not call upon us to examine . . . ."].) However, we have no occasion to go beyond a review of the summary adjudication decision the trial court reached at the law-and-motion stage. In reviewing this decision, we find that on the evidence before the court the judge properly ruled Scientology qualifies as a religion within the meaning of the Freedom of Religion Clauses of the United States and California Constitutions.

This brings us to the remaining three questions as to each of the four courses of conduct: Is the conduct a "religious practice"? If so, is there a compelling secular interest in requiring compensation for the injuries attributable to that practice? If the constitutional immunity is not overridden by a compelling state interest in the ordinary situation, is it nevertheless stripped away here because the religion coerced the injured member into continuing his participation in the practice?

B. *Even Assuming the Retributive Conduct Sometimes Called "Fair Game" Is a Core Practice of Scientology It Does Not Qualify for Constitutional Protection*

As we have seen, not every religious expression is worthy of constitutional protection. To illustrate, centuries ago the

inquisition was one of the core religious practices of the Christian religion in Europe. This religious practice involved torture and execution of heretics and miscreants. (See generally Peters, Inquisition (1988); Lea, The Inquisition of the Middle Ages (1961).) Yet should any church seek to resurrect the inquisition in this country under a claim of free religious expression, can anyone doubt the constitutional authority of an American government to halt the torture and executions? And can anyone seriously question the right of the victims of our hypothetical modern day inquisition to sue their tormentors for any injuries—physical or psychological—they sustained?

We do not mean to suggest Scientology's retributive program as described in the evidence of this case represented a full-scale modern day "inquisition." Nevertheless, there are some parallels in purpose and effect. "Fair game" like the "inquisition" targeted "heretics" who threatened the dogma and institutional integrity of the mother church. Once "proven" to be a "heretic," an individual was to be neutralized. In medieval times neutralization often meant incarceration, torture, and death. (Peters, Inquisition, *supra*, pp. 57, 65-67, 87, 92-94, 98, 117-118, 133-134; Lea, The Inquisition of the Middle Ages, *supra*, pp. 181, 193-202, 232-236, 250-264, 828-829.) As described in the evidence at this trial the "fair game" policy neutralized the "heretic" by stripping this person of his or her economic, political and psychological power. (See, e.g., *Allard* v. *Church of Scientology* (1976) 58 Cal.App.3d 439, 444 [former church member falsely accused by Church of grand theft as part of "fair game" policy, subjecting member to arrest and imprisonment].)

In the instant case, at least, the prime focus of the "fair game" campaign was against the "heretic" Wollersheim's economic interests. Substantial evidence supports the inference Scientology set out to ruin Wollersheim's photography enterprise. Scientologists who worked in the business were instructed to resign immediately. Scientologists who were customers were told to stop placing orders with the business. Most significantly, those who owed money for previous orders were instructed to renege on their payments. Although

these payments actually were going to a factor not Wollersheim, the effect was to deprive Wollersheim of the line of credit he needed to continue in business.

Appellants argue these "fair game" practices are protected religious expression. They cite to a recent Ninth Circuit case upholding the constitutional right of the Jehovah's Witness Church and its members to "shun" heretics from that religion even though the heretics suffer emotional injury as a result. (*Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875.) In this case a former Jehovah's Witness sued the church and certain church leaders for injuries she claimed to have suffered when the church ordered all other church members to "shun" her. In the Jehovah Witness religion, "shunning" means church members are prohibited from having any contact whatsoever with the former member. They are not to greet them or conduct any business with them or socialize with them in any manner. Thus, there was a clear connection between the religious practice of "shunning" and Ms. Paul's emotional injuries. Nonetheless, the trial court dismissed her case. The Ninth Circuit affirmed in an opinion which expressly held "shunning" is a constitutionally protected religious practice. "[T]he defendants, . . . possess an affirmative defense of privilege—a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability." (*Id.* at p. 879.)

We first note another appellate court has taken the opposite view on the constitutionality of "shunning." (*Bear* v. *Reformed Mennonite Church* (Pa. 1975) 341 A.2d 105.) In this case the Pennsylvania Supreme Court confronted a situation similar to *Paul* v. *Watchtower Bible & Tract Soc. of New York*. The plaintiff was a former member of the Mennonite Church. He was excommunicated for criticizing the church. Church leaders ordered that all members must "shun" the plaintiff. As a result, both his business and family collapsed. The appellate court reversed the trial court's dismissal of the action, holding: "In our opinion, the complaint, . . . raises issues that the 'shunning' practice of appellee church and the conduct of the individuals may be an

excessive interference within areas of 'paramount state concern,' i.e., the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth *may* have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." (*Bear* v. *Reformed Mennonite Church*, *supra*, 341 A.2d at p. 107, emphasis in original.)

We observe the California Supreme Court has cited with apparent approval the viewpoint on "shunning" expressed in *Bear* v. *Mennonite Church*, *supra*, rather than the one adopted in *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*. (See *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114.) But even were *Paul* v. *Watchtower Bible & Tract Soc. of New York* the law of this jurisdiction it would not support a constitutional shield for Scientology's retribution program. In the instant case Scientology went far beyond the social "shunning" of its heretic, Wollersheim. Substantial evidence supports the conclusion Scientology leaders made the deliberate decision to ruin Wollersheim economically and possibly psychologically. Unlike the plaintiff in *Paul* v. *Watchtower Bible & Tract Soc. of New York*, Wollersheim did not suffer his economic harm as an unintended byproduct of his former religionists' practice of refusing to socialize with him any more. Instead he was bankrupted by a campaign his former religionists carefully designed with the specific intent it bankrupt him. Nor was this campaign limited to means which are arguably legal such as refusing to continue working at Wollersheim's business or to purchase his services or products. Instead the campaign featured a concerted practice of refusing to honor legal obligations Scientologists owed Wollersheim for services and products they already had purchased.

If the Biblical commandment to render unto Caesar what is Caesar's and to render unto God what is God's has any meaning in the modern day it is here. Nothing in *Paul* v. *Watchtower Bible & Tract Soc. of New York* or any other case we have been able to locate even implies a religion is entitled to constitutional protection for a campaign deliber-

ately designed to financially ruin anyone—whether a member or non-member of that religion. Nor have we found any cases suggesting the free exercise clause can justify a refusal to honor financial obligations the state considers binding and legally enforceable. One can only imagine the utter chaos that could overtake our economy if people who owed money to others were entitled to assert a freedom of religion defense to repayment of those debts. It is not unlikely the courts would soon be flooded with debtors who claimed their religion prohibited them from paying money they owed to others.

We are not certain a deliberate campaign to financially ruin a former member or the dishonoring of debts owed that member qualify as "religious practices" of Scientology. But if they do, we have no problem concluding the state has a compelling secular interest in discouraging these practices. (See pp. 14-17, *supra*.) Accordingly, we hold the Freedom of Religion guarantees of the U.S. and California Constitutions do not immunize these practices from civil liability for any injuries they cause to "targets" such as Wollersheim.

C. *"Auditing" Is a Constitutionally Protected Religious Practice Where It Is Conducted in a Non-coercive Environment But Is Not Protected Where Conducted Under a Threat of Economic, Psychological and Political Retribution as It Was Here*

Auditing is a process of one-on-one dialogue between a Scientology "auditor" and a Scientology student. The student ordinarily is connected to a crude lie detector, a so-called "E-Meter." The auditor asks probing questions and notes the student's reactions as registered on the E-Meter.

Through the questions, answers, and E-meter readings, the auditor seeks to identify the student's "n-grams" or "engrams." These "engrams" are negative feelings, attitudes, or incidents that act as blockages preventing people from realizing their full potential and living life to the fullest. Since Scientology holds the view people actually have lived many past lives over millions of years they carry "engrams" accumulated during those past lives as well as some from

their present ones. Once the auditor identifies an "engram" the auditor and the student work to surface and eliminate it. The goal is to identify and eliminate all the student's engrams so he or she can achieve the state of "clear." Students can pass through several levels of "auditing" en route to ever higher states of "clear."

Auditing performs a similar function for Scientology as sermons and other forms of mass persuasion do for many religions. In those religions, ministers, priests or other clergy preach to the multitude in order to bring their adherents into line with the religion's principles. Scientology instead emphasizes a one-on-one approach—the "auditing" process—to accomplish the same purpose.

At the law-and-motion stage, the trial court granted summary adjudication that "auditing" is a "religious practice" of Scientology. Once again, our review of the trial court decision reveals that on the basis of the evidence before the court on that occasion, the ruling is correct. Thus for purposes of this appeal we find "auditing" qualifies as a "religious practice" just as Scientology qualifies as a "religion."

Having found for purposes of this appeal that Scientology is a religion and auditing is a religious practice, we must next ask whether the state has a "compelling interest" in awarding compensation for any harm auditing may cause which outweighs the values served by the religious expression guarantees of the constitution.

We first note we have already held there was substantial evidence to support a jury finding that what happened during the "auditing" process, along with Scientology's other conduct toward Wollersheim, caused this particular adherent serious emotional injury. We further found substantial evidence Scientology leaders were aware of Wollersheim's psychological weakness and yet continued practices during auditing sessions which caused the kinds of psychological stress that led to his mental breakdown. Thus, there is adequate proof the religious practice of auditing caused real harm in this instance to this individual and that appellants' outrageous conduct caused that harm. Furthermore, there is sufficient evidence to support a conclusion that despite their

knowledge auditing was aggravating Wollersheim's serious psychological problems appellants deliberately insisted he not seek help from professional psychotherapists. None of this, however, means auditing represents such a threat of harm to society that the state has a compelling interest in awarding compensation which overcomes the values served by the religious expression guarantees of the constitution.

To better understand why we conclude *voluntary* auditing may be entitled to immunity from liability for the emotional injuries it causes, consider some analogies. Assume Wollersheim were not a former Scientologist, but a former follower of one of the scores of Christian denominations. Further assume he sued on grounds a preacher's sermons filled him with such feelings of inferiority and guilt his manic-depressive condition was aggravated to the same degree Wollersheim contends auditing aggravated his mental illness in this case. Or assume another Wollersheim sued another church for a similar emotional injury on grounds his mental illness had been triggered by what a cleric told him about his sins during a confession—or series of confessions. It is one of the functions of many religions to "afflict the comfortable"—to deliberately generate deep psychological discomfort as a means of motivating "sinners" to stop "sinning." Whether by "hell fire and damnation" preaching, "speaking in tongues," private chastising, or a host of subtle and not so subtle techniques religion seeks to make us better people.

Many of these techniques are capable of inflicting emotional distress severe enough that it is foreseeable some with psychiatric problems will "crack" or be driven into a deep depression. But the constitution values the good religion does for the many more than the psychological injury it may inflict on the few. Thus, it cannot tolerate lawsuits which might chill religious practices—such as auditing, "hell fire and damnation" preaching, confessions, and the like—where the only harm which occurs is emotional injury to the psychologically weak.

There is an element present in the instant case, however, that reduces the religious value of the "auditing" practiced

on Wollersheim and increases its harm to the community. This is the element of coercion. Scientology, unlike most other religions or organizations claiming a religious purpose, uses various sanctions and the threat of sanctions to induce continued membership in the Church and observance of its practices. These sanctions include "fair game", "freeloader debt" and even physical restraint. There was nothing in the evidence presented at this trial suggesting new recruits and members undergoing lower-level "auditing" were subject to sanctions if they decided to leave. Nor was there evidence these recruits or "lower level" auditors would be aware any program of sanctions even existed and thus might be intimidated by it. But there was evidence others, like Wollersheim, who rose to higher levels of auditing and especially those, like Wollersheim, who became staff members—the rough equivalent of becoming a neophyte priest or minister—were aware of these sanctions and what awaited them if they chose to "defect." Thus, their continued participation in "auditing" and the other practices of Scientology was not necessarily voluntary.

Wollersheim was familiar with the whole spectrum of sanctions and indeed was the target of some during and after his affiliation with Scientology. He first learned of one of these forms of retribution, "fair game," in 1970. He also knew that, despite the Church's public rejection of the fair game practice, it continued to use fair game against targeted ex-Scientologists throughout the 1970's. Under Scientology's "fair game" policy, someone who threatened Scientology by leaving the church "may be deprived of property or injured by any means by a Scientologist . . . . [The targeted defector] may be tricked, sued or lied to or destroyed."

Wollersheim feared "fair game" would be practiced against him if he refused further auditing and left the Church of Scientology. As described in the previous section, those fears proved to be accurate. Scientology leaders indeed became very upset by his defection and retaliated against his business.

But "fair game" was not the only sanction which Scientology held over Wollersheim's head during his years as an

"upper level" auditor and occasional staff member. Scientology also used a tactic called "freeloader debt" as a means of coercing Wollersheim's continued participation in the church and obedience to its practices. "Freeloader debt" was devised by Scientology founder L. Ron Hubbard as a means of punishing members who, inter alia, chose to leave the Church or refused to disconnect from a suppressive person.

"Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. The Church maintained separate records which listed the discounts allowed. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally charged to the member.[2] A person who stayed in the Church for five years could easily accumulate a "freeloader debt" of between $10,000 and $50,000. Wollersheim was familiar with the "freeloader debt" policy as well as the "fair game" policy. He also knew the Church was recording the courses and auditing sessions he was receiving at the discounted rate. The threat of facing that amount of debt represented a powerful economic sanction acting to coerce continued participation in auditing as the core religious practice of the Church of Scientology.

There also was evidence Wollersheim accepted some of his auditing under threat of *physical* coercion. In 1974, despite his repeated objections, Wollersheim was induced to participate in auditing aboard a ship Scientology maintained as part of its Rehabilitation Project Force. The Church obtained Wollersheim's attendance by using a technique dubbed "bait and badger." As the name suggests, this tactic deployed any number of Church members against a recalcitrant member who was resisting a Church order. They would alternately promise the "bait" of some reward and "badger" him with

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2 During the 1970's a staff member was paid approximately $17 per week for an expected 50 hours of work. In 1973, Wollersheim earned between $10 to $18 per week when he worked at the Celebrity Center as a staff member. This salary was augmented by an occasional $10 bonus.

verbal scare tactics. In the instant case, five Scientologists "baited and badgered" Wollersheim continuously for three weeks before he finally gave in and agreed to attend the Rehabilitation Project Force.

But these verbal threats and psychological pressure tactics were only the beginning of Wollersheim's ordeal. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. The regime included mornings of menial and repetitive cleaning of the ship followed by an afternoon of study or co-auditing. The evenings were spent working and attending meetings or conferences. Wollersheim and others were forced to sleep in the ship's hole. A total of thirty people were stacked nine high in this hole without proper ventilation. During his six weeks under these conditions, Wollersheim lost 15 pounds.

Ultimately, Wollersheim felt he could bear the regime no longer. He attempted to escape from the ship because as he testified later: "I was dying and losing my mind." But his escape effort was discovered. Several Scientology members seized Wollersheim and held him captive. They released him only when he agreed to remain and continue with the auditing and other "religious practices" taking place on the vessel.

One of the psychiatric witnesses testified that in her opinion Wollersheim's experience on the ship was one of five cataclysmic events underlying her diagnosis of his mental illness and its cause. As the psychiatrist reported, following this incident, Wollersheim felt the Church "broke him." In any event, this episode demonstrated the Church was willing to physically coerce Wollersheim into continuing with his auditing. Moreover they were willing to do so even when it was apparent this practice was causing him serious mental distress and he preferred to cease or at least suspend this particular religious practice. Not only was the particular series of auditing sessions on the ship conducted under threat of physical compulsion, but the demonstrated willingness to use physical coercion infected later auditing sessions. The fact the Church was willing to use physical coercion on this occasion to compel Wollersheim's continued participation in auditing added

yet another element to the coercive environment under which he took part in the auditing process.

There was substantial evidence here from which the jury could have concluded Wollersheim was subjecting himself to auditing because of the coercive environment with which Scientology had surrounded him. To leave the church or to cease auditing he had to run the risk he would become a target of "fair game", face an enormous burden of "freeloader debt", and even confront physical restraint. A religious practice which takes place in the context of this level of coercion has less religious value than one the recipient engages in voluntarily. Even more significantly, it poses a greater threat to society to have coerced religious practices inflicted on its citizens.

There are important analogies to *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092. In *Molko* the California Supreme Court held a religious organization could be held civilly liable for using deception and fraud to *seduce* new recruits *into the church*.[3] In that case the church concealed from new recruits the fact they were enlisting in the Unification Church. The plaintiffs argued the Unification Church psychologically and physically coerced them into accepting the Church and, therefore, they were unable to refuse formally joining once the Church's true identity was revealed. (*Id.* at pp. 1108-1109.) The Supreme Court agreed and further concluded there was no constitutional infirmity to bar the action.

"We conclude, . . . that although liability for deceptive recruitment practices imposes a marginal burden on the Church's free exercise of religion, the burden is justified by the compelling state interest in protecting individuals and families from the substantial threat to public safety, peace

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3 In *Molko*, two plaintiffs brought actions against the Unification Church for, inter alia, fraud and intentional infliction of emotional distress based upon the Unification Church's initial misrepresentations concerning its religious affiliation. The Supreme Court held the First Amendment did not bar the plaintiffs' claims to the extent they were based upon actual coercive conduct by the Unification Church as opposed to merely the threat of divine retribution should the plaintiffs leave.

and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion." (*Id.* at p. 1118.)

Here Scientology used *coercion*—"fair game," "freeloader debt," and in this instance, at least, physical restraint, along with the threat one or more of these sanctions will be deployed—to prevent its members from *leaving* the Church. This coercion is similar to the coercion found in *Molko* and far different from the threats of *divine* retribution our Supreme Court held was non-actionable. (*Id.* at pp. 1120, 1122 ["To the extent the claims are based merely on threats of divine retribution if [the plaintiffs] left the church, they cannot stand].) Instead, Scientology promised—and in this case delivered—retribution in the here and now.

In *O'Moore* v. *Driscoll* (1933) 135 Cal.App. 770 cited with approval by the California Supreme Court in *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114, a Catholic priest sued a Catholic organization and an ordained priest for false imprisonment when the plaintiff was restrained in an asylum run by the Catholic Church to compel his confession to criminal acts. The practice of confessing one's sins is an established religious practice of the Catholic church. But that did not immunize the defendants from liability for harm the plaintiff suffered where the religious practice was imposed on him in a coercive environment. (*Id.* at p. 774.)

In the instant case except for the experience on the ship the coercion was more subtle than physical restraint. Yet the threat of "fair game" and "freeloader debt" and even the possibility of future physical restraint loomed over Wollersheim whenever he contemplated leaving Scientology and terminating auditing or the other practices of that religion.

It is not only the acts of coercion themselves—the sabotage of Wollersheim's business and the episode of captivity on the ship—which are actionable. These acts of coercion and the threat of like acts make the Church's other harmful conduct actionable as well. No longer is Wollersheim's continued participation in auditing (or for that matter, his compliance with the "disconnect" order) merely his *voluntary* participation in Scientology's religious practices. The evidence establishes

Wollersheim was coerced into remaining a member of Scientology and continuing with the auditing process. Constitutional guarantees of religious freedom do not shield such conduct from civil liability. We hold the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer through religious practices they are coerced into accepting. Such conduct is too outrageous to be protected under the constitution and too unworthy to be privileged under the law of torts.

We further conclude this compelling interest outweighs any burden such liability would impose on the practice of auditing. We concede as the California Supreme Court did in *Molko* that allowing tort liability for this conduct imposes some burden on appellants' free exercise of this religion.[4] Despite the possibility of liability Scientologists can still *believe* it serves a religious purpose to impose and threaten to impose various sanctions on staff members or upper level auditors who might leave the church or cease its core religious practices. But it does place a burden on Scientologists should they act on that belief. Scientology would be subject to possible monetary loss if someone suffers severe psychological harm during auditing where that auditing is conducted under the threat of these sanctions. Likewise, Scientology may lose some staff members and upper level auditors who would not continue in the Church or continue to submit to the core practice of auditing except for their fears of retribution.

Like the Supreme Court in *Molko*, however, we find these burdens "while real, are not substantial" and, moreover, are the minimum required to achieve the state interest. To borrow from the high court's language in *Molko*: "Being subject

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4 "While such liability does not impair the Church's right to believe in recruiting through deception, its very purpose is to discourage the Church from putting such belief into practice by subjecting the church to possible monetary loss for doing so. Further, liability presumably impairs the Church's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the Church when they are told its true identity." (*Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal. 3d 1092, 1117.)

to liability [for coerced auditing] does not in any way or degree prevent or inhibit [Scientologists] from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading [L. Ron Hubbard's] message among the population. It certainly does not, . . . compel [Scientologists] to perform acts 'at odds with fundamental tenets of their religious beliefs.' [Citation omitted.]" (*Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1117.)

Most significantly, by imposing liability in the instant case we "in no way or degree prevent or inhibit" Scientology from continuing the free exercise of the religious practice of auditing. Returning to the words of the Supreme Court: "At most, it potentially closes one questionable avenue for" coercing certain members to remain in the church and to continue its core practices such as auditing." (46 Cal.3d at p. 1117.)

D. *The "Disconnect" Policy Is Not a Constitutionally Protected Religious Practice in the Circumstances of This Case*

Substantial evidence supports the conclusion Scientology encouraged Wollersheim to "disconnect" from family members, including his wife and parents. Furthermore, substantial evidence supports the conclusion Scientology has a general policy of encouraging members to "disconnect" from non-Scientologists who oppose Scientology or express reservations about its teachings.

The first question is whether the "disconnect" policy qualifies as a "religious practice" of Scientology. The trial court did not grant summary adjudication on this factual issue. Nonetheless, we find the evidence supported the conclusion disconnect is a "religious practice." "Disconnect" is similar in purpose and effect to the "shunning" practiced by Jehovah's Witnesses and Mennonites, among others. It also shares some attributes with the remote monasteries common to many other religions. All of these practices serve to isolate

members from those, including family members, who might weaken their adherence to the religion. Courts have held these policies qualify as "religious practices" of other religions. (See, e.g., *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875, 879-880; *Rasmussen* v. *Bennet* (Mont. 1987) 741 P.2d 755 [Church statements condemning plaintiffs' conduct and calling for shunning were privileged under the First Amendment].) We see no justification for treating Scientology's "disconnect" policy differently and thus hold it is a "religious practice".

We recognize the "shunning" cases have involved claims brought by former church members *whom other family members were ordered to shun*. The instant case, in contrast, involves a cause of action brought by a former church member *ordered to shun the rest of his family* not the other way around. In the circumstances of this case this is a distinction without a difference. Here appellants caused Wollersheim to isolate himself from his parents, wife and other family members even though appellants had reason to know it would inflict serious emotional injury on him. The injury to him and to the family was just as severe as if his family had "shunned" him.

We need not and do not reach the question whether the practice of "disconnect" is constitutionally protected religious activity in ordinary circumstances. (Contrast *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875 [religion cannot be held civilly liable to shunned former member because "shunning" is constitutionally protected] with *Bear* v. *Reformed Mennonite Church*, *supra*, 341 A.2d 105 [religion may be civilly liable to shunned former member because "shunning" must yield to compelling state interest in promoting family relations].) Whether or not the "disconnect" policy is constitutionally protected when practiced in a voluntary context it is not so protected if practiced in the coercive environment appellants imposed on Wollersheim. The reasons are the same as apply to "auditing." (See pp. 30-39, *supra*.) Substantial evidence supports the finding Scientology created this coercive environment and Wollersheim continued to submit to the practices of the

church such as "disconnect" because of that coercion. Furthermore, the evidence in the instant case is sufficient to support a factual finding appellants imposed the "disconnect" policy on Wollersheim with the knowledge he was psychologically susceptible and therefore would suffer severe emotional injury as a result. Accordingly, in the circumstances of this case, the free exercise clause did not immunize appellants from liability for the "disconnect" policy practiced on respondent.

E. *Scientology's Improper Disclosure of Information Wollersheim Gave During Confidential Religious Expressions Is Not Religious Expression Immunized From Liability by the Constitution*

There is substantial evidence Wollersheim divulged private information during auditing sessions under an explicit or implicit promise the information would remain confidential. Moreover, there is substantial evidence Scientology leaders and employees shared this confidential information and used it to plan and implement a "fair game" campaign against Wollersheim. Scientology argues there also is substantial evidence in the record supporting its defense that Scientology leaders and employees shared this confidential information only in accordance with normal procedures and for the purpose of gaining the advice and assistance of more experienced Scientologists in evaluating Wollersheim's auditing sessions. However, the jury was entitled to disregard this innocent explanation and to believe Wollersheim's version of how and why Scientology divulged information he had supplied in confidence.

The intentional and improper disclosure of information obtained during auditing sessions for non-religious purposes can hardly qualify as "religious expression." To clarify the point, we turn once again to a hypothetical situation which presents a rough analogy under a traditional religion. Imagine a stockbroker had confessed to a cleric in a confessional that he had engaged in "insider trading." Sometime later this same stockbroker leaves the church and begins criticizing it

and its leadership publicly. To discredit this critic, the church discloses the stockbroker has confessed he is an insider trader. This disclosure might be said to advance the interests of the cleric's religion in the sense it would tend to discourage former members from criticizing the church. But to characterize this violation of religious confidentiality as "religious expression" would distort the meaning of the English language as well as the United States Constitution. This same conclusion applies to Scientology's disclosures of Wollersheim's confidences in the instant case. And, since these disclosures do not qualify as "religious expression" they do not qualify for protection under the freedom of religion guarantees of the constitution. (See Discussion at pp. 18-19, *supra*.)

III. THE CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL INJURY MUST BE REVERSED

For reasons set forth in section II, we have concluded Scientology is not constitutionally immunized from civil liability for its cumulative course of conduct to intentionally inflict emotional injury on Wollersheim. However, this course of conduct does not supply a suitable predicate for a cause of action based on *negligent* infliction of emotional injury. These actions are potentially actionable only when they are driven by an animus which can properly qualify them as "outrageous conduct." That is, they must be done for the purpose of emotionally injuring the plaintiff, or at the least with reckless disregard about their adverse impact on plaintiff's mental health. (*Nally* v. *Grace Community Church*, *supra*, 47 Cal.3d 278, 300; *Miller* v. *National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1487.)

We have held in the prior section that Scientology and its leaders indeed engaged in these actions with an intent to emotionally injure Wollersheim. But this intentional activity was alleged in the intentional infliction of emotional injury count and was tried under that count. The negligence count, on the other hand, of necessity alleges a lesser degree of culpability

and can be sustained only if the defendant could be liable even if the emotional injuries were caused by completely unintentional, merely negligent acts or omissions. (See *Slaughter* v. *Legal Process Courier Service* (1984) 162 Cal.App.3d 1236, 1249; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 838, p. 195.)

In this context, Scientology is responsible only if it or any other religion could be held liable where through inadvertence something it or its leaders did damaged someone's business and thereby caused the businessman emotional injury. Or if it or any other religion could be held liable where it inadvertently revealed some information a member had disclosed in confidence as part of a religious practice like auditing or a confession. Or if it or another religion could be held liable where its functionaries inadvertently said something during auditing or a sermon or a confession which triggered a listener's nascent mental illness.

At bottom, this question of duty is a matter of weighing competing public policy considerations. (*Dillon* v. *Legg* (1968) 68 Cal.2d 728, 734; *Ballard* v. *Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)[5] On balance, the religious freedom consideration outweighs any concern about spreading the cost of emotional injury, reducing the frequency of such emotional injuries, and the like. It is one thing to say we will impose liability when a religious organization intentionally or recklessly sets out to ruin a business or to reveal confidential information or to "audit" mercilessly or to "disconnect" a psychologically weak person from his family and thereby succeeds in emotionally injuring a member or former member of that religion. It is quite another to impose liability for negligent acts which inadvertently cause the same types of injuries. (See *Coon* v. *Joseph* (1987) 192 Cal.App.3d 1269, 1273.)

Since we hold religious organizations owe no duty to members or former members with respect to these forms of

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5 " '[D]uty' is not an immutable fact of nature ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' [Citation.]" (*Ballard* v. *Uribe*, *supra*, 41 Cal.3d at p. 572, fn. 6.)

injury, the cause of action for negligent infliction of emotional injury must be reversed. We need not, however, reverse the entire judgment. Here, the jury found the Church liable for both negligent and intentional infliction of emotional distress. As we discussed above, there is substantial evidence to support a finding on the intentional infliction theory. We may fairly presume any damages awarded on the negligence theory are subsumed in the award for intentional infliction of emotional distress. Accordingly, any error in allowing the jury to consider the negligence theory does not affect the judgment. (See *Vahey* v. *Sacia* (1981) 126 Cal.App.3d 171, 179-180; *Bacciolieri* v. *Charles C. Meek Milling Co.* (1959) 176 Cal.App.2d 822, 826.)

IV. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS TO DISMISS FOR FAILURE TO FILE BEFORE THE STATUTE OF LIMITATIONS HAD EXPIRED ON WOLLERSHEIM'S CAUSES OF ACTION

Scientology argues on appeal, as it did at virtually every opportunity below, that Wollersheim's causes of action are barred by the statute of limitations. At each and every juncture the various trial judges who heard these arguments rejected them. These judges ruled correctly that Wollersheim's causes of action were subject to the discovery rule. (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 356, p. 383.) The issue in each instance, thus, was *when* Wollersheim discovered, or should have discovered, all of the elements of his cause of action against Scientology. (*See Leaf* v. *City of San Mateo* (1980) 104 Cal.App.3d 398, 407-408.) The trial judges properly ruled this issue, in turn, was a jury question. (*Id.* at p. 409.)

On appeal, this court is bound to uphold the jury's resolution of these factual questions unless we determine the findings are not supported by substantial evidence. After a careful review of the evidence, we conclude these findings about the timeliness of Wollersheim's filing of this case are supported by substantial evidence. Consequently, we affirm

the rulings by the judges below and, furthermore, we likewise affirm the factual findings the jury impliedly made that Wollersheim did not discover and should not have discovered his causes of action until a time within the statutory period.

V. THE TRIAL COURT DID NOT COMMIT INSTRUCTIONAL ERROR OR EVIDENTIARY ERROR DURING THIS FIVE-MONTH TRIAL WHICH DENIED APPELLANTS A FAIR TRIAL OR DUE PROCESS OF LAW

Appellants' final contention is that they were denied a fair trial and due process of law because of various instructional and evidentiary rulings the court made during this five-month trial. Considering the length of the trial it is surprising appellants were able to identify so few questionable rulings.

Appellants first complain the trial court erroneously denied two instructions they requested. The first of these instructions restated the elements of the cause of action for intentional infliction of emotional distress or outrageous conduct with a slant favoring appellants' position.[6]

As requested the instruction implied the jury was to disregard evidence of appellants' acts which did not fit precisely

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6 The requested instruction reads:

"Plaintiff's claim for intentional infliction of emotional distress, or outrageous conduct, is divided into several parts. [¶] First, plaintiff's claim that defendant engaged in outrageous conduct by subjecting plaintiff to its practice of auditing—which, as I shall instruct you, is the central religious practice of the religion of Scientology. [¶] Second, plaintiff claims that defendant caused plaintiff to separate from his family and friends as a condition for remaining in Scientology. [¶] Third, plaintiff claims that defendant 'attacked plaintiff's business' and induced those of his employees who were Scientologists to leave his employ. [¶] Fourth, plaintiff claims that defendant disclosed his auditing files in disregard of alleged promises of confidentiality to persons not authorized to receive them. [¶] All of these acts were allegedly undertaken to inflict severe emotional distress upon the plaintiff. [¶] The plaintiff is restricted in this case to the claims he set forth in his complaint. Evidence of any purported acts of the defendant not relating to the four categories I have just described to you may not be considered in determining whether plaintiff has established that defendant committed the tort of intentional infliction of emotional distress [App. A306-07]."

under the courses of conduct as they defined them. Actually the plaintiffs' causes of action were broader in many respects than the descriptions the appellants requested. Moreover, some of the evidence introduced at the trial related to acts relevant to issues of appellants' state of mind (intent, motivation, and the like) and whether respondent was voluntarily participating in Scientology's practices or was doing so within a coercive environment. Accordingly, the instruction as requested would have been misleading to the jury. The trial court gave an instruction which set forth the elements of the cause of action. Any amplification of that instruction should have been more accurate than the one appellants requested and less misleading as to the full scope of the jury's range of inquiry. Thus it was not error to refuse to give this instruction.

Appellants also complain about the refusal of one of their requested instructions ordering the jury in very specific fashion to disregard evidence presented which was relevant to the non-suited fraud counts. Again, the requested instruction was stated in overbroad terms and unduly slanted in appellants' direction. For instance, as requested, it instructed the jury that "it must disregard evidence presented in this trial regarding statements purportedly made to [the plaintiff] to induce his participation in defendant church." If given, this instruction could have misled the jury into believing it must disregard evidence which provided context for the intentional infliction count or which went to the presence or absence of coercion and appellants' state of mind. So once again it was not error to refuse these instructions. (See *Wank* v. *Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1113; *Lubek* v. *Lopes* (1967) 254 Cal.App.2d 63, 73.)

In any event, on reviewing the total evidence offered in this trial, we find that even if it were error to refuse these instructions that error was not prejudicial. (*Henderson* v. *Harnischfeger* (1974) 12 Cal.3d 663, 670; *Williams* v. *Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489; see 9 Witkin, Cal. Procedure, *supra*, Appeal, § 352, pp. 355-356.) We cannot say that the giving of these instructions would

have substantially enhanced the chances appellants would have prevailed.

Appellants likewise complain about evidentiary rulings. Although they mention only a handful of specific incidents, they accuse the judge of admitting a mass of prejudicial evidence about actions Scientology took toward third persons. In their brief appellants concede this evidence was admissible under Evidence Code section 1101(b) as proof of "intent" and "malice."[7] But they ask us to reverse the trial court under Evidence Code section 352 on grounds the relevance of this evidence was overwhelmed by its prejudicial effect.[8]

In reviewing the trial court's exercise of its discretion under section 352, appellate courts traditionally give great deference to the trial court's evaluation of relevance versus prejudice. (See *People* v. *Mota* (1981) 115 Cal.App.3d 227, 234; 1 Johnson, Cal. Trial Guide (1988) § 22.40, p. 22-43.) In the instant case we do not find an abuse of discretion. Much of the evidence appellants object to was highly relevant to show the network of sanctions and coercive influences with which Scientology had surrounded Wollersheim. Much of the rest was highly relevant to show Wollersheim's state of mind while undergoing audit, disconnect and the like or appellants' state of mind, that is, their intent, malice, motives, and the like. Whatever prejudice to appellants may have accompanied introduction of this evidence it does not "substantially outweigh" the probative value of the evidence to important issues in this case.

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7 "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, sub. (b).

8 "The court in its discretion may exclude evidence if its probative value *is substantially outweighed* by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, italics added.)

Finally, appellants complain about the alleged prejudicial conduct of Wollersheim's counsel during the trial and closing argument. As was true of their claims of instructional and evidentiary evidence, appellants provide us with only a few examples of alleged prejudicial error and imply these are but the tip of the iceberg. They confine themselves to this handful of incidents either because no other potentially prejudicial incidents occurred or because they expect this court to do their job by scouring the 25,000 page record for other examples to bolster their claim of error. If what appellants set forth in their brief represent the only incidents they allege as prejudicial conduct, we find them insufficient to justify reversal under applicable standards of prejudice. (*Garden Grove School Dist.* v. *Hendler* (1965) 63 Cal.2d 141, 144 [attorney misconduct only requires reversal if "it is reasonable to conclude that a verdict more favorable to defendants would have been reached but for the error"]; see 9 Witkin, Cal. Procedure, *supra*, § 340, p. 346.) And if these brief examples were only an invitation to do appellants' work in identifying prejudicial error in their opposing attorney's conduct, we decline that invitation. (*Horowitz* v. *Noble* (1978) 79 Cal.App.3d 120, 139 [" 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment' "]; *Wint* v. *Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 265.)

VI. THE GENERAL DAMAGES AND PUNITIVE DAMAGES THE JURY AWARDED ARE EXCESSIVE FOR THE INTENTIONAL INFLICTION OF EMOTIONAL INJURY COUNT AND THUS THOSE DAMAGE AWARDS MUST BE REDUCED

In the previous section, we concluded the allegations which are supported by substantial evidence are enough to sustain a cause of action for intentional infliction of emotional injury against Scientology. But that conclusion does not determine whether the proved allegations support the level of damages the jury awarded under this cause of action. We turn to that issue now.

We are only concerned now with whether a reasonable juror could have found this level of "outrageous" conduct inflicted $5 million worth of emotional injury on Wollersheim. Similarly, we ask whether this level of "outrageous" conduct and Scientology's degree of intent in carrying it out warrant $25 million in punitive damages. We conclude these awards are excessive for the conduct alleged and proved in this case.

An award for compensatory damages will be reversed or reduced "upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion." (*Koyer* v. *McComber* (1938) 12 Cal.2d 175, 182; accord *Schroeder* v. *Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 ["an appellate court may reverse an award only ' "When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice' " [Citations]"]; *Fagerquist* v. *Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727; see 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 46, p. 446.) Even under this stringent standard, it is manifest the jury's award here is excessive since it is so grossly disproportionate to the evidence concerning Wollersheim's damages.

Wollersheim's psychological injury although permanent and severe is not totally disabling. Moreover, even Wollersheim admits Scientology's conduct only aggravated a preexisting psychological condition; Scientology did not create the condition. While the jury awarded Wollersheim $5 million in compensatory damages, we determine the evidence only justifies an award of $500,000.

"It is well established that a reviewing court should examine punitive damages and, where appropriate, modify the amount in order to do justice." (*Gerard* v. *Ross* (1988) 204 Cal.App.3d 968, 980; *Allard* v. *Church of Scientology*, *supra*, 58 Cal.App.3d at p. 453.) In reviewing a punitive damages award, the appellate court applies a standard similar to that used in reviewing compensatory damages, i.e., whether, after reviewing the entire record in the light most

favorable to the judgment, the award was the result of passion or prejudice. (See *Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 64; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 388.) However, the test here is somewhat more refined, employing three factors to evaluate the propriety of the award.

The first factor is the degree of reprehensibility of the defendant's conduct. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) "[C]learly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Ibid.*)

The second factor is the relationship between the amount of the award and the actual harm suffered. (*Ibid.*; *Seeley* v. *Seymour* (1987) 190 Cal.App.3d 844, 867.) This analysis focuses upon the ratio of compensatory damages to punitive damages; the greater the disparity between the two awards, the more likely the punitive damages award is suspect. (*Seeley* v. *Seymour*, *supra*, 190 Cal.App.3d at p. 867; see *Little* v. *Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469-470.)

Finally, a reviewing court will consider the relationship of the punitive damages to the defendant's net worth. (*Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal. App.3d at p. 390.) In applying this factor courts must strike a proper balance between inadequate and excessive punitive damage awards. "While the function of punitive damages will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort, the function also will not be served by an award which is larger than necessary to properly punish and deter." (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal.App.3d at p. 391.)

As to the punitive damage award, we find it is not commensurate with Scientology's conduct *in this case*. This is not a situation where the centerpiece of the case involved a Church-ordered physical beating or theft or criminal fraud against Wollersheim. The "outrageous conduct" was less outrageous and more subtle than that. We further note Wol-

lersheim's counsel in the full flood of his emotional summation at the conclusion of this lengthy trial only deigned to urge the jury to return punitive damages of *as much as* "six or seven million dollars."

The evidence admitted at trial supported the finding the appellant church had a net worth of $16 million at the time of trial. Accepting these figures as true, the jury awarded Wollersheim *150 percent of* appellant's net worth in punitive damages alone—195 percent if compensatory damages are included. This appears not just excessive but preposterous. (*Seeley* v. *Seymour*, *supra*, 190 Cal.App.3d at p. 869 [punitive damages reversed; award was 200 percent of defendant's net worth]; *Burnett* v. *National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012 [punitive damages reduced; initial award was 35 percent of defendant's net worth]; *Egan* v. *Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 824 [punitive damages reversed; award was 58 percent of defendant's net income]; *Allard* v. *Church of Scientology*, *supra*, 58 Cal.App.3d at pp. 445-446, 453 [punitive damages reversed; award was 40 percent of defendant's net worth]; compare *Devlin* v. *Kearney AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal.App.3d at pp. 391-392 [punitive damages affirmed where award was 17.5 percent of defendant's net worth]; *Schomer* v. *Smidt* (1980) 113 Cal.App.3d 828, 836-837 [punitive damages affirmed; award was 10 percent of defendant's net worth]; *Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100 [punitive damages affirmed; award was 7.2 percent of defendant's net income].) We find it especially excessive given the nature of the "outrageous conduct" in this particular case. Accordingly we reduce the punitive damage award to $2 million.

DISPOSITION

The judgment is reversed as to the cause of action for negligent infliction of emotional injury. The judgment as to the cause of action for intentional infliction of emotional injury is modified to reduce the compensatory damages to $500,000

and the punitive damages to $2 million. In all other respects the judgment is affirmed. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (Fred), J.

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027
Dept. 117N
Honorable Ronald Swearinger

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY

Dated: September 18, 1986

Counsel for Plaintiff: CHARLES O'REILLY

Counsel for Defendant: GEORGE ROSENBERG
EARLE COOLEY
JOHN PETERSON

NOTICE OF RULING

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Denied

and

DEFENDANT'S MOTION FOR NEW TRIAL

Denied

A copy of this minute order is sent via U.S. Mail this date to:

EARLE C. COOLEY
COOLEY, MANION, MOORE & JONES
530 Atlantic Avenue
Boston, MA 02210

JOHN G. PETERSON
PETERSON & BRYAN
8530 Wilshire Blvd. Ste. 407
Beverly Hills, CA 90211

CHARLES O'REILLY
GREENE, O'REILLY, et al.
816 S. Figueroa Street
Los Angeles, CA 90017

MINUTE ORDER